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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~381.~~ ~~110~~ 13

THE UNION NATIONAL BANK OF CHICAGO, HENRY C. BANNARD AND BENNETT LYMAN, AS BANNARD, LYMAN & CO., PETER LORILLARD, CHARLES SEIDLER, AND PIERRE LORILLARD, JR., AS P. LORILLARD & CO., ET AL., APPELLANTS,

vs.

THE BANK OF KANSAS CITY, THE BANK OF COMMERCE, THE CITIZENS' NATIONAL BANK, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED OCTOBER 12, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 11, 1888.

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1 UNITED STATES OF AMERICA, *sct:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri, in the case of Union National Bank of Chicago, Henry C. Bannard, Bennett Lyman, Peter Lorillard, Charles Seidler, Pierre Lorillard, Jr., Boston Sugar Refining Co., Marx W. Mendel, Emanuel A. Mendel, John Arbuckle, Charles A. Arbuckle, William V. R. Smith, Continental Sugar Refinery, Standard Sugar Refinery, and Leavenworth Sugar Company, complainants, against Bank of Kansas City, Bank of Commerce, Citizens' National Bank, Charles Stewart, James B. Melone, Richard A. Melone, and Charles H. Benedict, Defendants.

Be it remembered that heretofore, to wit, in vacation of the circuit court of the United States aforesaid, and on the 30th day of April, A. D. 1883, the following entry was made upon the order book of said court, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*
} In Chancery.

This day come complainants, by their solicitors, Messrs. Dobson & Douglass, and present to the court a transcript of record in the above-entitled cause, removed on change of forum from Jackson county circuit court, and move the court for leave to file the same, and said motion being submitted is sustained, and it is ordered that said transcript of record be filed and said cause docketed, which is accordingly done. Thereupon complainants, by their solicitors, enter their appearance herein.

2 Said transcript of record is in words and figures as follows, to wit:

STATE OF MISSOURI,
County of Jackson, } *ss:*

Be it remembered that heretofore, to wit, on the 23rd day of March, A. D. 1883, there was filed in the office of the clerk of the circuit court of Jackson county, Missouri, a petition, wherein the Saint Louis National Bank and others are plaintiffs and the Bank of Kansas City and others are defendants, which said petition is in words and figures as follows, to wit:

Petition.

In the Circuit Court of Jackson County and State of Missouri, at Kansas City, Mo., Division No. 1. April Term, 1883.

UNION NATIONAL BANK OF CHICAGO, a Corporation; HENRY C. Bannard and Bennett Lyman, Peter Lorillard, Charles Seedler; and Pierre Lorillard, Jr., Composing Firm of P. Lorillard & Co.;

Boston Sugar Refining Company, a Corporation; Mark W. Mendel and Emanuel A. Mendel, Composing Firm of M. W. Mendel & Brother; John Arbuckle, Charles Arbuckle, and William V. R. Smith, Composing Firm of Arbuckle Brothers; Continental Sugar Refinery, a Corporation; Standard Sugar Refinery, a Corporation, and Leavenworth Sugar Company, a Corporation, Plaintiffs,

against

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation; Citizens' National Bank, a Corporation; Charles Stewart and James B. Melone, Richard A. Melone, and Charles H. Benedict, Defendants.

The plaintiffs complain on behalf of themselves and all others, the creditors of said defendants, James B. Melone, Richard
3 A. Melone, and Charles H. Benedict, who shall come in and seek relief by and contribute to the expense of this action, and therefore allege—

1st. That at the times hereinafter mentioned the plaintiffs, The Union National Bank of Chicago, doing business in the city of Chicago, Illinois, and the defendant, The Citizens' National Bank, doing business at Kansas City, Missouri, were and still are banking corporations duly and legally organized under and by virtue of the laws of the United States; that the plaintiffs, Peter Lorillard, Charles Seedler, & Pierre Lorillard, Jr., were at said times partners under the firm name of P. Lorillard & Co. and doing business as such in the State of New Jersey; that the plaintiffs, The Boston Sugar Refining Company, was and still is a corporation doing business in and organized under the laws of the State of Massachusetts; that the plaintiffs, Marx W. Mendel and Emanuel W. Mendel, were then and still are partners doing business under the firm name of M. W. Mendel & Co. in the State of New York; that the plaintiffs, Henry C. Bannard and Bennett Lyman, were then and still are partners in the firm name of Bannard, Lyman & Co. and doing business as such in the State of Illinois; that the plaintiffs, John Arbuckle, Charles Arbuckle, and William V. R. Smith, were then and still are partners doing business in the firm name of Arbuckle Brothers in the State of New York; that the Continental Sugar Refinery, plaintiff, was then and still is a corporation organized under the laws of and doing business in the State of Massachusetts; that the plaintiff, The Standard Sugar Refinery, was then and still is a corporation under the laws of and doing business in the State of Massa-
4 chusetts; that the plaintiff, The Leavenworth Sugar Company, was then and still is a corporation doing business in and organized under the laws of the State of Kansas; that the defendant, The Bank of Kansas City, was then and still is a banking corporation duly and legally organized under the laws of the State of Missouri; that the defendant, The Bank of Commerce,—a corporation at Kansas City and organized under the laws of the State of Missouri, and was at the times hereinafter mentioned known as and called by the name of the Kansas City Savings Association, the name of said corporation having been afterwards duly changed, on

the — day of ——, 1882, and that the said defendants, James B. Melone, Richard A. Melone, and Chas. H. Benedict, were, on the 16th day of February, 1882, and for a long time prior thereto, engaged in the wholesale grocery business at Kansas City, Missouri, as partners under the firm name of Benedict, Melone & Co.

2nd. That on the 13th day of December, 1882, the said plaintiff, The Union National Bank of Chicago, recovered in said circuit court a judgment against the said defendants last mentioned for the sum of one thousand five hundred nine & $\frac{48}{100}$ dollars for its debt and twelve and $\frac{55}{100}$ dollars for costs; that on the said 13th day of December, 1882, the said plaintiffs, Henry C. Bannard and —— Lyman, in their firm name, recovered in said circuit court a judgment against said last-mentioned defendants for the sum of six hundred fifty-two & $\frac{89}{100}$ — for their debt and twelve & $\frac{30}{100}$ dollars for their costs; that on the 13th day of December, 1882, the said plaintiffs, Marx W. and Emanuel W. Mendel, in their firm name, recovered in said circuit court a judgment against said last-mentioned defendants for the sum of nine hundred and seventy & $\frac{80}{100}$
5 dollars for their costs; that on the 18th day of December, 1882, the plaintiffs, The Boston Sugar Refinery Company, recovered in said circuit court a judgment against said last-mentioned defendants for the sum of two thousand four hundred fifty-three and $\frac{55}{100}$ dollars for its debt; that on the — day of ——, 1882, the said plaintiffs, John Arbuckle, Charles Arbuckle, and William V. R. Smith, in their firm name, recovered in said circuit court against the said last-mentioned defendants a judgment for the sum of one thousand seven hundred sixty-six and $\frac{55}{100}$ dollars; that on the — day of ——, 1882, the said plaintiff, The Continental Sugar Refinery, recovered in said circuit court against the said last-mentioned defendants a judgment for the sum of one thousand one hundred sixty-seven $\frac{97}{100}$ dollars; that the said plaintiff, The Standard Sugar Refinery, recovered in said circuit court on the — day of ——, 1882, a judgment against the said last-mentioned defendants for the sum of one thousand forty-two & $\frac{87}{100}$ dollars; that on the — day of ——, 1882, the said plaintiff, The Leavenworth Sugar Company, recovered in said circuit court a judgment against said last-named defendant for the sum of two thousand six hundred eighty & $\frac{48}{100}$ dollars; that on the — day of —— 1882, the said plaintiffs, Peter Lorillard, Chas. Seedler, and Pierre Lorillard, Jr., presented to the defendant, Chas. Stewart, as receiver of said firm of Benedict, Melone & Co., their claim against said last-named defendants, J. B. Melone, R. A. Melone, and C. H. Benedict, for goods, wares, and merchandise furnished them by said last-named plaintiffs, and their said claim was duly allowed by said receiver in the sum of twelve hundred thirty-five and $\frac{85}{100}$ dollars.

6 3rd. That after the contracting of said indebtedness, to wit, on the 10th day of February, 1882, the defendants, Richard A. Melone and Charles H. Benedict, in their firm name of Benedict, Melone & Co., at Kansas City, being then and there insolvent and wholly unable to meet their liabilities, made, executed, and delivered their certain instrument in writing, by which they granted,

bargained, sold, and delivered to the defendant, Charles Stewart, all the goods, wares, and merchandise of whatever description or character of the said firm of Benedict, Melone & Company situate and being in their store-room, No. 304 Delaware street, in Kansas City, Missouri, and all their store fixtures, desks, scales, delivery wagons, horses, and harness, and also all notes, accounts, and bills receivable due or to become due to said firm of Benedict, Melone & Company from any parties whatsoever, in trust, however, for the purpose of securing their codefendants, The Bank of Kansas City, The Kansas City Savings Association, now called "The Bank of Commerce," by which name it is here sued, and The Citizens' National Bank, corporations as aforesaid, in the payment of divers sums of money, amounting in the aggregate to about nineteen thousand dollars ($19,000), which was then owing to said banks by the said Benedict, Melone & Co. In said written instrument it was intended to convey to said trustee for the purposes aforesaid all the property and assets of any kind and description belonging to said firm of Benedict, Melone & Co., and, among other things, it was provided that said defendant, Charles Stewart, should enter at once upon the discharge of the duties of his said trust and take immediate possession of all the property conveyed thereby and convert the same into money in any manner he might think proper and pay the same, or
7 so much thereof as might be necessary, to his said codefendants, The Bank of Kansas City, The Bank of Commerce (then known by the name of The Kansas City Savings Association), and The Citizens' National Bank, in the discharge of their said debts within five days after they become due and payable, and any surplus remaining to be paid to the said Richard A. and James B. Melone and Charles H. Benedict; which said written instrument was duly acknowledged by the grantors thereto in the same manner as prescribed by law in cases wherein real estate is conveyed in this State, was duly filed for record, and recorded in the office of the recorder of deeds of Jackson county, at Kansas City, on the 10th day of February, 1882, a copy of which written instrument is herewith filed, the original not being in the possession or under the control of plaintiffs.

4th. That on the said 10th day of February, 1882, simultaneously with the making of said written instrument, the said defendant, Chas. H. Benedict, one of the members of the said firm of Benedict, Melone & Co., commenced his action in the circuit court of Jackson county, Missouri, against his codefendants, Richard A. Melone and James B. Melone, partners as aforesaid, alleging, among other things, that he, the said C. H. Benedict, plaintiff in the said action, had dissolved the partnership existing between the members of said firm of Benedict, Melone & Co.; that the said J. B. Melone had become insolvent; that the said plaintiff, together with the defendants in said action, had control of a large stock of goods, wares, and merchandise and debts due said firm, and that said firm was largely indebted to various persons from whom they had purchased goods, and praying the court for the appointment of a receiver
8 for partnership property and for the ascertainment and

payment of partnership notes; that upon the hearing thereof on said day, before the Honorable Turner A. Gill, one of the judges of the circuit court of Jackson county, Missouri, at chambers, the said defendant, Charles Stewart, was appointed receiver of the partnership property of the said firm of Benedict, Melone & Co., and immediately qualified and entered upon his duties as such receiver.

And thereupon the said firm became dissolved and ceased to do business.

Plaintiffs aver and charge that at the time of making said written instrument and of instituting said action for the appointment of a receiver for partnership property the said firm of Benedict, Melone & Co. was and still is legally indebted to various other firms and persons besides those mentioned in said written instrument, and then was and still is insolvent and unable to pay all their creditors in full, and that said firm and all the defendants herein had full knowledge of such insolvency.

Plaintiffs further state that the defendant, J. B. Melone, was a resident of Macon city, Missouri, and possessed of larger means and greater financial credit than his copartners, C. H. Benedict and R. A. Melone, and had furnished the larger part of the capital theretofore used and then invested in the business of the said firm of Benedict, Melone & Co. Being largely interested in business pursuits other than the business of said Benedict, Melone & Co., and out of which grave financial complications grew, he, the said J. B. Melone, seeing that it was impracticable for said firm to longer continue business,
9 as they, the said firm, were hopelessly insolvent, on the — day of February, 1882, and prior to the execution of said instrument and the appointment of said receiver, sent a special messenger from his home, at Macon city, to his said copartners, R. A. Melone and C. H. Benedict, at Kansas City, with written directions to them to make a general assignment of all the partnership property of said firm of Benedict, Melone & Co. to the defendant, Charles Stewart, for the benefit of all their creditors, of all which the said defendants had notice before the execution of the said written instrument and the appointment of said receiver; but disregarding such express direction and in direct violation of the same and at the instance of said defendant, Charles Stewart, who urged and insisted that said defendant banks be preferred as creditors and first secured in their said debts and refused to act as requested by said J. B. Melone unless said defendant banks were so preferred and secured, the defendants, R. A. Melone and C. H. Benedict, after they had consulted their counsel in regard to making a general assignment for the benefit of all the creditors of Benedict, Melone & Co. and had employed counsel for that purpose in consequence of the requests and importunities of said defendant Stewart, executed and delivered said instrument in the firm name of Benedict, Melone & Co., thereby attempting to create such preferences in favor of said banks; that the said J. B. Melone was then ignorant of said attempted preference in favor of said banks, and did not, for months afterwards, know that a general assignment for the benefit of all their creditors

had not been made, but was led to believe and did believe his directions had been followed and a general assignment made.

10 5th. That at the time of making said written instrument to the defendant Stewart, for the purpose of securing the payment of the debts owing to said defendant banks, it was fully understood between all the defendants herein that the said firm of Benedict, Melone & Co. was wholly insolvent and was to be immediately dissolved, and that the said Charles Stewart, trustee in said written instrument, was to be appointed receiver of the partnership property of said firm. Plaintiffs say that the simultaneous action of the defendants, R. A. Melone and C. H. Benedict, in making said written instrument in the manner hereinbefore stated and in dissolving said partnership and in having said defendant Stewart appointed receiver of the partnership property was a fraudulent attempt upon their part to evade the provisions of the statute in reference to voluntary assignments for the benefit of creditors.

6th. Plaintiffs further state that by reason of all the premises and of the statute relating to voluntary assignments for the benefit of creditors the written instrument aforesaid operates as and is in law and equity a voluntary deed of assignment on the part of said firm of Benedict, Melone & Co. to defendant Stewart for the benefit of all their creditors, and by virtue of the same the said firm assigned and conveyed to the defendant Stewart, as assignee, all their property and assets for the benefit of all their creditors, in proportion to their respective claims; that all the property so assigned was then and there delivered to said defendant Stewart in trust under said instrument, operating as an assignment in the manner aforesaid,

11 who thereupon accepted the trust and immediately took possession and control of such property. Said property and assets were of large value, out of which said defendant Stewart has realized the sum of about fifty thousand dollars, enough to pay all the creditors of said Benedict, Melone & Co. about sixty cents on the dollar of their demands if the preference so attempted to be made in said instrument be set aside and said instrument held and declared to be a voluntary assignment for the benefit of all the creditors of said firm.

7th. That under said instrument, operating as an assignment as aforesaid, it became and was the duty of said defendant Stewart, as assignee, within fifteen days after the execution of said instrument, to file in the office of the clerk of the circuit court of Jackson county a full and sworn inventory of the property assigned; to cause the same to be duly appraised, to file in said court within three days after the filing of said instrument for record a bond, with good and sufficient securities in double the value of the assigned property, conditioned for the discharge in all things of his duties as such assignee and the faithful execution of the trust confided to him by said assignment, and to proceed to execute said trust by fixing the time and place for and giving public notice of such time and place of adjusting and allowing demands against the said trust estate; to adjust and allow such demands; to pay all such as may be allowed in proportion to the amounts thereof; to dispose of the property for that

purpose, and from time to time to exhibit his accounts of said trust estate to the said court, and generally fully to execute and
12 faithfully perform said trust according to law.

That, notwithstanding his duty in the premises, said defendant Stewart, from the time of accepting said trust, has wholly and entirely failed and refused to perform any of the duties so required of him under the provisions of the statutes regulating voluntary assignments for the benefit of creditors, and has at all times denied the rights of the other creditors of said firm of Benedict, Melone & Co. to share equally with the defendant banks in the distribution of the said trust estate, but has proceeded to execute his said trust and wind up and settle the affairs of said partnership by virtue and under the powers attempted to be conferred upon him as aforesaid by said written instrument, and also under and by virtue of his appointment as receiver of said partnership property.

8th. That, with full knowlege of the rights of the plaintiffs and the other creditors of said firm of Benedict, Melone & Co. to an equal distribution of said trust estate or the proceeds thereof among them in payment of their claims, the said defendant Stewart sold and disposed of all said trust property and effects so assigned to him, and received therefor as aforesaid the sum of about fifty thousand dollars in money, and, after paying the costs and expenses attending the matter, has either paid said banks the full amount due them, respectively, on their said claims or is now withholding for said banks such amount from distribution among the other creditors of said firm of Benedict, Melone & Co.; but plaintiffs say they are not sufficiently advised to enable them to state with more precision the disposition of said trust fund by said Stewart otherwise than as stated; but the plaintiffs say that if said Stewart has paid said defendant banks the full amount of their respective claims out of said trust fund the said banks have fully indemnified said defend-
13 ant Stewart against the demands of these plaintiffs and the other creditors of said Benedict, Melone & Co. on account of such action; and, further, if the said defendant banks have received from said defendant Stewart the full amount of their said demands, they did so with full knowledge of the rights of these plaintiffs and the other creditors of said Benedict, Melone & Co. to share equally with them in the proceeds of said trust estate.

9th. That at the time of the execution of the said written instrument and the appointment of defendant Stewart as such receiver, the said firm of Benedict, Melone & Co. were largely indebted to persons and firms other than said defendant banks and these plaintiffs in large amounts unknown to plaintiffs, which are long since due and unpaid; that said creditors are numerous, and many of them are residents of this State, so that it is impossible to bring them before this court in this action.

Wherefore plaintiffs bring this suit for the benefit of all of said creditors as well as themselves who may wish to join herein and contribute to the expenses of this action.

Wherefore plaintiffs pray, in consideration of all the premises, that said written instrument to the said Stewart be adjudged and

declared by this court to be a general assignment for the benefit of all the creditors of the said firm of Benedict, Melone & Co. in proportion to their respective claims; that said defendant Charles Stewart may be declared and decreed to be the assignee of said firm of Benedict, Melone & Co. for the benefit of all their creditors; that he be required to give bond as such assignee, as in such cases provided by the statute of this State regulating voluntary assignments for the benefit of creditors; that he be required to fully account for
14 all sums of money and property of said firm of Benedict, Melone & Co. that may have come into his possession or under his control under and by virtue of said written instrument or otherwise; that he be required to adjust and allow all legal claims and demands against said firm which were owing at the time of making said written instrument; that he be required to distribute the said trust fund so in his hands to the payment of the claims of all the creditors of said Benedict, Melone & Co. in proportion to the respective amounts thereof, and for that purpose that the said defendants, The Bank of Kansas City, The Bank of Commerce, and The Citizens' National Bank, be compelled to fully account for and pay over to the defendant Stewart, as such assignee, all sums of money received by them from said Stewart, if any, under and in pursuance of the terms expressed in said written instrument, and for such other and further relief as may seem just and equitable.

DOBSON & DOUGLASS,
Att'ys for St. Louis National Bank.
LATHROP & SMITH,
Att'ys for Union National Bank of Chicago and Barnard, Lyman & Co.
TOMLINSON & ROSS,
Att'ys for P. Lorillard & Co.
GAGE, LADD & SMALL,
Att'ys for Boston Sugar Refining Co.
STRONG & MIDDLEBROOK,
Att'ys for Arbuckle Bros., Continental Sugar Refinery, and Leavenworth Sugar Co.
TRABER & GIBSON,
Att'ys for M. W. Mendel & Bros.

DOBSON & DOUGLASS, *Of Counsel.*

Whereupon summons was issued on said petition, the sheriff's return thereon being in words and figures as follows, to wit:

15 Executed this writ in Jackson county, Missouri, on the 24th day of March, 1883, by delivering a copy of this writ, together with a copy of the petition hereto attached, to C. J. White, cashier of the Bank of Commerce, it being the first defendant served; and, further, on the same day, by delivering a copy of this writ to each of the within-named defendants, E. K. Thornton, cashier of the Bank of Kansas City; A. A. Whipple, cashier of the Citizens' National Bank; Richard A. Melone, and Charles H. Benedict; and, further, on the same day, by leaving a copy of this writ at the usual

place of abode of the within-named defendant, Charles Stewart, with a person of his family over the age of fifteen years.

JOHN C. HOPE, *Sheriff*,
D. F. GREENWOOD, *Dep'y*.

Fee: 6 def'ts, $6.00.

The following exhibit was filed with the petition in said cause:

This deed, made and entered this 16th day of January, 1882, by and between Benedict, Melone & Co., a firm doing business at Kansas City, Missouri, and composed of C. H. Benedict and R. A. Melone, of Jackson county, and J. B. Melone, of Macon county, all of the State of Missouri, parties of the first part, and Charles Stewart, of Kansas City, Missouri, party of the second part, and the Bank of Kansas City, the Kansas City Savings Association, and the Citizens' National Bank, all being corporations duly organized, the first two under and by virtue of the laws of the State of Missouri, and the said national bank under and by virtue of the laws of the United States, all of said banks doing business at Kansas City, Missouri, parties of the third part, witnesseth: That the said parties of the first part, in
16 consideration of the debt and trust hereafter mentioned and created and of the sum of one dollar to them in hand paid by said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey, and deliver, and by these presents do grant, bargain, sell, convey, & deliver, unto the said party of the second part the following-described personal property and choses in action, to wit: All goods, wares, and merchandise of whatsoever character or description (being such, however, as is generally kept in stock by wholesale grocery merchants) now situate and being in the store building No. 304 Delaware street, Kansas City, Missouri, which building is occupied by said firm of Benedict, Melone & Co.; also all store fixtures, desks, scales, delivery wagons, horses and harness for the same which *is* used in and about the business of Benedict, Melone & Co.; also all notes, accounts, and bills receivable due or to become due said firm from any parties whatsoever; to have and to hold the same unto said party of the second part and to his heirs and assigns forever: Provided always, and it is agreed and understood between the parties to these presents, That if the said Benedict, Melone & Co shall well and truly pay unto said Bank of Kansas City the sum of six thousand dollars ($6,000.00), with legal interest thereon, which said firm owes said bank, as evidenced by certain drafts drawn by said firm and cashed by said bank, and now held by them, which said drafts are in words and figures as follows:

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Nov. 22nd*, 1881.

Ninety days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to the account of—

BENEDICT, MELONE & CO.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

17 $2,000.00. KANSAS CITY, *January* 13*th*, 1882.

Sixty days after date pay to the order of ourselves two thousand dollars, value received, and charge same to the account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

$1,000.00. KANSAS CITY, *January* 16*th*, 1882.

Ninety days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to the account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

$1,000.00. KANSAS CITY, *January* 24*th*, 1882.

Ninety days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to the account of—

BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. C. G. Epperson.

$1,000.00. KANSAS CITY, *Feb.* 8*th*, 1882.

Ninety days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to the account of—

BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. C. G. Epperson.

And provided also that if said firm shall well and truly pay to the Kansas City Savings Association the sum of eleven thousand five hundred dollars ($11,500.00), with legal interest thereon, which they owe said association, as evidenced by certain drafts drawn by said firm and cashed by said association and owned by them, and by certain promissory notes executed *to* said firm to said association, which drafts and notes are described in words and figures as follows:

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

No. 8186.

$1,000.00. KANSAS CITY, Mo., *Dec.* 21*st*, 1881.

18 Sixty days after date pay to the order of ourselves, with exchange on New York or St. Louis, one thousand dollars, value received, and charge to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware St.

$1,000.00. KANSAS CITY, Mo., *Dec.* 7, 1881.

Ninety days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to the account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY Mo., *Dec.* 7, 1881.

Seventy-five days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to the account of—

BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. C. G. Epperson.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Dec.* 21, 1881.

Seventy-five days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to the account of—

BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

[Written across the face in red ink:] C. G. Epperson.

19 $1,000.00. KANSAS CITY, Mo., *Dec.* 22*d*, 1881.

Ninety days after date we promise to pay to the order of C. J. White, cashier, one thousand dollars at value received, with interest at — per cent. per annum.

BENEDICT, MELONE & CO.

$1,000.00. KANSAS CITY, Mo., *Jan'y* 7, 1882.

Sixty days after date we promise to pay to the order of Kansas City Savings Association one thousand dollars at value received, with interest at — per cent. per annum.

BENEDICT, MELONE & CO.

$1,000.00. KANSAS CITY, Mo., *Jan'y* 7*th*, 1882.

Ninety days after date we promise to pay to the order of Kansas City Savings Association one thousand dollars at value received, with interest at — per cent. per annum.

BENEDICT, MELONE & CO.

$1,000.00. KANSAS CITY, Mo., *Jan'y* 16*th*, 1882.

Seventy-five days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; Payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

$1,000.00. KANSAS CITY, Mo., *Jan'y* 16*th*, 1882.

Ninety days after date we promise to pay to the order of the Kansas City Savings Association one thousand dollars at Kansas City, Mo., value received, with interest at 10 per cent. per annum.

BENEDICT, MELONE & CO.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Jan'y* 16*th*, 1882.

20 Thirty days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

$500.00. KANSAS CITY, Mo., *Feb.* 13*th*, 1882.

At sight pay to the order of ourselves five hundred dollars.

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

$1,000.00. KANSAS CITY, Mo., *Feb.* 15, 1882.

At sight pay to the order of ourselves one thousand dollars.

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

And provided further, That said firm shall well and truly pay unto the Citizens' National Bank of Kansas City the sum of fifteen hundred dollars, with legal interest thereon, which said firm owes said National Bank, as evidenced by certain drafts drawn by said firm and cashed by said National Bank and now owned by them, which are described in words and figures as follows:

$750. KANSAS CITY, *Feb.* 7, 1883.

Sixty days after date pay to the order of ourselves seven hundred and fifty dollars, value received, and charge same to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

$750.00. KANSAS CITY, Mo., *Feb.* 7, 1882.

Ninety days after date pay to the order of ourselves seven
21 hundred and fifty dollars, value received, and charge to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

[Written across the face in red ink:] Accepted; payable at Macon Savings Bank, Macon, Mo. J. B. Melone.

(All of said above-mentioned drafts are endorsed by the firm of Benedict, Melone & Co.), then these presents and everything herein shall cease and be void; but if they, the said Benedict, Melone & Co., shall fail or make default in the payment of such indebtedness to said three above-mentioned banks or any part thereof when the same shall have become due and payable for five days, then it shall be lawful for said party of the second part to sell said property in any manner he shall think fit, and out of the proceeds arising from said sale pay off said indebtedness or so much thereof as shall be unpaid, together with the costs and expenses of said sale, and the overplus, if any there be, shall be paid to said parties of the first part. Said party of the second part shall take immediate possession of said property.

In testimony whereof the said Benedict, Melone & Co., by Richard A. Melone, one of the members of said firm, have hereunto set their hands and seals on this Feb'y 16th, 1882.

BENEDICT, MELONE & CO., [SEAL.]

By RICHARD A. MELONE.

STATE OF MISSOURI, } ss:
County of Jackson, }

Be it known that on this 16th day of February, 1882, before the undersigned, notary public within and for the county of Jackson and State of Missouri, personally came Richard A. Melone, who is personally known to me to be the same person who signed the name of Benedict, Melone & Co. to the foregoing deed as a party thereto and who is personally known to me to be a member of said
22 firm, and the said Richard A. Melone acknowledged said deed and instrument to be the act and deed of Benedict, Melone & Co. for the uses and purposes therein stated. My commission expires the 23rd day of August, 1884.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 16th day of February, 1882.

[SEAL.] HENRY M. STONESTREET,
Notary Public, Jackson County, Mo.

Filed for record and duly recorded in my office on this 16th day of February, A. D. 1882.

C. D. LUCAS, *Recorder,*
By C. H. LUCAS, *D. R.*

And afterwards, to wit, on the 9th day of April, A. D. 1883, it being the first day of the regular term of said court, the following proceedings were had, to wit:

ST. LOUIS NATIONAL BANK *et al.* }
vs. } 3421.
BANK OF KANSAS CITY *et al.* }

This day defendants, The Bank of Commerce and Charles Stewart, file demurrer.

Said demurrer is in words and figures as follows, to wit:

In the Jackson Circuit Court, in Jackson County, Missouri, Sitting at Kansas City, Missouri.

THE ST. LOUIS NATIONAL BANK *et al.*, Pl'ffs,
vs.
THE BANK OF KANSAS CITY *et al.*, Defendants.

This day come the defendants, The Bank of Commerce and Charles Stewart, and demur to the petition of the plaintiffs on the ground that the petition does not state facts sufficient to
23 constitute a cause of action. It does not show that the partners or any of them intended or attempted to make any voluntary assignment, nor that any mistake was made in any manner. This court has no jurisdiction, and said petition is otherwise defective and insufficient.

KARNES & ESS,
Att'ys for Def'ts, Stewart & Bank of Commerce.

And afterwards, at the regular April term of said court, and on the 10th day of April, A. D. 1883, the following further proceedings were had in this cause, to wit:

SAINT LOUIS NATIONAL BANK *et al.*

vs.

BANK OF KANSAS CITY *et al.*

This day defendants, Bank of Kansas City and Citizens' National Bank, file their demurrer to plaintiffs' petition.

Said demurrer is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, at Kansas City, Missouri. April Term, 1883.

SAINT LOUIS NATIONAL BANK, Plaintiff,

vs.

THE BANK OF KANSAS CITY *et al.*, Defendants.

Defendants, The Bank of Kansas City and Citizens' National Bank, demur to plaintiffs' petition for the reason that it states no cause of action as to said defendants.

TICHENOR, WARNER AND DEAN,
Att'ys for said Defendants.

24 And afterwards, at said term of said court, and on the 11th day of April, A. D. 1883, the following entry appears of record, to wit:

ST. LOUIS NATIONAL BANK *et al.*
vs.
BANK OF KANSAS CITY *et al.* } 3421.

This day comes the Union National Bank of Chicago, a corporation; Henry C. Bannard, and Bennett Lyman, composing firm of Bannard, Lyman & Co.; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., composing firm of P. Lorillard & Co.; Boston Sugar Refinery Company, a corporation; Marx W. Mendel and Emanuel W. Mendel, composing firm of M. W. Mendel and Brother; John Arbuckle, Charles Arbuckle, and William V. R. Smith, composing firm of Arbuckle Bros.; Continental Sugar Refinery, a corporation; Standard Sugar Refinery, a corporation, and Leavenworth Sugar Company, by attorneys, and file herein their petition and bond for the removal of this cause into the circuit court of the United States for the western division of the western district of Missouri.

Said petition for removal is in words and figures as follows, to wit:

Petition for Removal of Cause to the Circuit Court of the United States and Western Division and Western District of Missouri.

In the Circuit Court of Jackson County and State of Missouri, at Kansas City, Mo., Division No. 1. April Term, 1883.

SAINT LOUIS NATIONAL BANK, a Corporation; UNION NATIONAL Bank of Chicago, a Corporation; Henry C. Bannard and Bennett Lyman; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., Composing Firm of P. Lorillard & Co.; Boston Sugar Refining Company, a Corporation; Marx W. Mendel and Emanuel W. Mendel, Composing Firm of M. W. Mendel & Brother; John Arbuckle, Charles Arbuckle, and William V. R. Smith, Composing Firm of Arbuckle Brothers; Continental Sugar Refinery, a Corporation; Standard Sugar Refinery, a Corporation, and Leavenworth Sugar Company, a Corporation, Plaintiffs,

against

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation; Charles Stewart, and James B. Melone, Richard A. Melone, and Charles H. Benedict, Defendants.

To the honorable circuit court of Jackson county, Missouri:

Your petitioners, The Union National Bank of Chicago, a corporation; Henry C. Bannard and Bennett Lyman, composing firm of Bannard, Lyman & Co.; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., composing firm of P. Lorillard & Co.; Boston Sugar Refining Company, a corporation; Marx W. Mendel and Emanuel W. Mendel, composing firm of M. W. Mendel and Brother; John Arbuckle, Charles Arbuckle, and William V. R. Smith, composing firm of Arbuckle Bros.; Continental Sugar Refinery, a corporation; Standard Sugar Refinery, a corporation, and Leavenworth Sugar Company, respectfully represent and show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred
26 dollars, and that as to each of said petitioners, firms, and corporations the matter and amount in dispute in the said suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioners, The Union National Bank of Chicago, a corporation organized under the laws of —, and the said firm of Bannard, Lyman & Co., were at the time of the commencement of this suit and still are citizens of the State of Illinois, and that the said firm of P. Lorillard & Co. were then and still are citizens of the State of New Jersey; that the said Boston Sugar Refining Company, a corporation; the Continental Sugar Refinery, and the said Standard Sugar Refinery were then and still are corporations organized under the laws of Massachusetts; were then and still are citizens of the State of Massachusetts; that the said firm of M. W.

Mendel and Brother and the said firm of Arbuckle Brothers were then and still are citizens of the State of New York; that the said Leavenworth Sugar Company, organized under the laws of the State of Kansas, was then and still is a citizen of the State of Kansas; that the defendants, The Bank of Kansas City, The Bank of Commerce, The Citizens' National Bank, Charles Stewart, James B. and Richard A. Melone, and Charles H. Benedict, were then and still are citizens of the State of Missouri.

And now your said petitioners offer herewith a bond, with good and sufficient securities, for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be
27 awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto; and your petitioners pray this honorable court to proceed no further herein, except to make the order of removal required by law and to accept the said securities and bond and to cause the record herein to be removed into the said circuit court of the United States in and for the western division of the western district of Missouri; and they will ever pray.

DOBSON & DOUGLASS,
LATHROP & SMITH,
TOMLINSON & ROSS,
GAGE, LADD & SMALL,
STRONG & MIDDLEBROOK, &
TRABER & GIBSON,
Attorneys for the Petitioners.

STATE OF MISSOURI, *County of Jackson:*

I, Gardiner Lathrop, being duly sworn, do say that I am a member of the firm of Lathrop and Smith and am one of the attorneys for the petitioners in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

GARDINER LATHROP.

Subscribed by the said Gardiner Lathrop in my presence and by him sworn to before me this 10th day of April A. D. 1883.

My notarial commission expires Aug. 1, 1886.

[SEAL.] FRANK BAUERLEIN,
Notary Public.

28 Said bond for removal is in words and figures as follows, to wit:

Bond for Removal of Cause.

In the Circuit Court of Jackson County and State of Missouri, at Kansas City, Mo., Division No. 1. April Term, 1883.

SAINT LOUIS NATIONAL BANK, a Corporation; UNION NATIONAL BANK of Chicago, a Corporation; Henry C. Bannard and Bennett Lyman; Peter Lorillard, Charles Siedler, and Pierre Lorillard, Jr., Composing Firm of P. Lorillard & Co.; Boston Sugar Refining Company, a Corporation; Marx W. Mendel and Emanuel W. Mendel, Composing Firm of M. W. Mendel & Brother; John Arbuckle, Charles Arbuckle, & William V. R. Smith, Composing Firm of Arbuckle Brothers; Continental Sugar Refinery, a Corporation; Standard Sugar Refinery, a Corporation, and Leavenworth Sugar Company, a Corporation, Plaintiffs,

against

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation; Charles Stewart, and James B. Melone, Richard A. Melone, and Charles H. Benedict, Defendants.

Know all men by these presents that we, C. L. Dobson, as principal, and Gardiner Lathrop and S. C. Douglass, as sureties, are held and firmly bound unto the defendants in the above-entitled cause in the sum of five hundred dollars; the payment whereof, well and truly to be made unto the said defendants, their heirs, successors, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said plaintiffs in the above-
29 entitled cause, other than the St. Louis National Bank, having petitioned the circuit court of Jackson county and State of Missouri, at Kansas City, Mo., for the removal of a certain cause therein pending, wherein they were plaintiffs and said defendants were defendants, to the circuit court of the United States in and for the western division of the western district of Missouri: Now, if the said plaintiffs, other than the St. Louis National Bank, shall enter enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 10th day of April, A. D. 1883.

C. L. DOBSON. [SEAL.]
GARDINER LATHROP. [SEAL.]
SHANNON C. DOUGLASS. [SEAL.]

And afterwards, at said April term of said court and on the 12th day of April, A. D. 1883, the following entry appears of record in this cause, to wit:

SAINT LOUIS NATIONAL BANK *et al.*
against
BANK OF KANSAS CITY *et al.* } 3421.

Now at this day come parties, by attorneys, and with leave of court plaintiffs amend their petition by striking out the St. Louis National Bank as one of the plaintiffs herein; and the plaintiffs, The
30 Union National Bank of Chicago, a corporation; Henry C. Bannard and Bennett Lyman, composing the firm of Bannard, Lyman & Co.; Peter Lorillard, Charles Siedler, and Pierre Lorillard, Jr., composing the firm of P. Lorillard & Co.; Boston Sugar Refining Company, a corporation; Marx W. Mendel and Emanuel W. Mendel, composing firm of M. W. Mendel & Brother; John Arbuckle, Charles Arbuckle, and William V. R. Smith, composing firm of Arbuckle Brothers; Continental Sugar Refinery, a corporation; Standard Sugar Refinery, a corporation; and the Leavenworth Sugar Company, having heretofore filed their petition and bond for removal of this cause into the circuit court of the United States for the western division of the western district of Missouri, the court now, upon consideration thereof, grants the prayer of said petition, approves said bond and the sureties thereof, and orders that the same be removed from this court into the circuit court of the United States for the western division of the western district at Missouri; and the said defendants object and except to the order of the court in so granting the prayer of said petition, approving said bond, and ordering the removal of this cause as aforesaid.

STATE OF MISSOURI, } *ss:*
County of Jackson, }

I, L. F. McCoy, clerk of the circuit court of Jackson county, Missouri, do hereby certify that the foregoing is a true and complete transcript of all the proceedings in the cause therein named as fully as the same appear on file or of record in my office at Kansas City.
31 In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in Kansas City, Mo., this 24th day of April, A. D. 1883.

L. F. McCOY, *Clerk.*

Afterwards, at a regular May term of said court, and on the 29th day of May, A. D. 1883, the following entry appears upon the order book of said court, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
THE BANK OF KANSAS CITY *et al.*

This day come complainants, by attorney, and file amended and supplemental bill herein. Said amended and supplemental bill is in words and figures as follows, to wit:

Bill of Complaint.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. May Term, 1883. In Equity.

To the judges of the circuit court of the United States for the western division of the western district of Missouri:

Your orators herein, Union National Bank of Chicago, a corporation; Henry C. Bannard and Bennett Lyman, composing the firm of Bannard, Lyman and Company; Peter Lorillard, Charles Seedler, and Pierre Lorillard, Jr., composing the firm of P. Lorillard and Company; Boston Sugar Refining Company; Marx W. Mendel and Emanuel W. Mendel, composing the firm of M. W. Mendel and Brother; John Arbuckle and William V. R. Smith, composing the firm of Arbuckle Brothers; Continental Sugar Refinery, a corporation; Standard Sugar Refinery, a corporation; and Leavenworth Sugar Company, a corporation, by leave of court, bring this their amended substituted bill of complaint for themselves and all other creditors of James B. Melone, Richard A. Melone, and Charles H. Benedict, composing the late firm of Benedict, Melone and Company, who shall come in and seek relief by and contribute to the expense of this action against Bank of Kansas City, a corporation; Bank of Commerce, a corporation; and Citizens' National Bank, a corporation; Charles Stewart and James B. Melone, Richard A. Melone, and Charles H. Benedict, and therefore your orators allege that at the times hereinafter mentioned the said Union National Bank of Chicago was and still is a banking corporation duly organized under the laws of the United States in regard to national banks, with its chief office or place of business in the city of Chicago, State of Illinois, and the said Union National Bank is therefore a citizen of the State of Illinois; that the said Peter Lorillard, Charles Seedler, and Pierre Lorillard were, at said times, partners doing business under the firm name of P. Lorillard and Company, in the State of New Jersey, and are residents and citizens of the State of New Jersey; that the said Boston Sugar Refining Company was and still is a corporation doing business in and organized under the laws of the State of Massachusetts and is a citizen of the State of Massachusetts; that the said Marx W. Mendel and Emanuel W. Mendel were then and still are partners, doing business under the firm name of M. W. Mendel and Brother, in the State of New York, and are each residents and citizens of the State of New York; that the said Henry C. Bannard and Bennett Lyman were then and still are partners,
33 doing business under the firm name of Bannard, Lyman and Company, in the State of Illinois, and that they are each residents and citizens of the State of Illinois; that the said John Arbuckle, Charles Arbuckle, and William V. R. Smith were then and still are partners, doing business in the firm name of Arbuckle Brothers, in the State of New York, and are each residents and citizens of the State of New York; that the said Continental Sugar Re-

finery was then and still is a corporation organized under the laws of and with its chief office or place of business in the State of Massachusetts, and is therefore a citizen of the State of Massachusetts; that the said Standard Sugar Refinery was then and still is a corporation organized under the laws of and with its chief office or place of business in the State of Massachusetts, and is therefore a citizen of the State of Massachusetts; that the said Leavenworth Sugar Company was then and still is a corporation duly organized under the laws of and with its chief office or place of business in the State of Kansas, and is therefore a citizen of the State of Kansas.

Your orators further say that the said Bank of Kansas City and the said Bank of Commerce were, at the dates hereinafter mentioned, corporations duly organized under the laws of and with their chief offices or places of business in the State of Missouri, and are therefore citizens of the State of Missouri, the said Bank of Commerce having been known as and called by the name of The Kansas City Savings Association prior to the — day of ——, 1882, at which time the name thereof was duly changed to Bank of Commerce; that the said James B. Melone, Richard A. Melone, and Charles H. Benedict were, on the sixteenth day of February, 1882, en-
34 gaged, at Kansas City, Missouri, as partners under the firm name of Benedict, Melone and Company, and the said J. B. and R. A. Melone and C. H. Benedict, as well as the said Charles Stewart, are each and all of them residents and citizens of the State of Missouri; that at the times hereinafter mentioned the said Citizens' National Bank of Kansas City was and still is a banking corporation, duly organized under the laws of the United States in regard to national banks, with its chief office or place of business in the city of Kansas and State of Missouri, and the said Citizens' National Bank is therefore a citizen of the State of Missouri.

Your orators further say that on the 13th day of December, 1882, the said Union National Bank of Chicago recovered in the circuit court of Jackson county, State of Missouri, a judgment against the said Jas. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, for the sum of one thousand five hundred nine and $\frac{43}{100}$ dollars for its debt and also for costs; that on the said 13th day of December, 1882, the said Henry C. Bannard and —— Lyman, partners as aforesaid, recovered in said Jackson county circuit court a judgment against said J. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, for the sum of six hundred fifty-two and $\frac{43}{100}$ dollars for their debt and also for their costs; that on the 13th day of December, 1882, the said Marx W. and Emanuel W. Mendel, partners as aforesaid, recovered in said Jackson county circuit court a judgment against said J. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, for the sum of nine hundred seventy-one and $\frac{43}{100}$ dollars for their debt and also for their costs; that on the 18th day of December, 1882, the said Boston Sugar Refining Company recovered in said Jackson county circuit court a judgment against said J. B. and R. A. Melone and C. H. Benedict,
35 partners as aforesaid, for the sum of two thousand four hundred fifty-three and $\frac{53}{100}$ dollars for its debt and also its

costs; that on the — day of ——, 1882, the said John Arbuckle, Charles Arbuckle, and William V. R. Smith, in their firm name, recovered in said Jackson county circuit court against the said J. B. and R. A. Malone and C. H. Benedict, partners as aforesaid, a judgment for the sum of one thousand seven hundred sixty-six and $\frac{55}{100}$ dollars, and also for their costs; that on the — day of ——, 1882, the said Continental Sugar Refinery recovered in said Jackson county circuit court against the said J. B. and R. A. Malone and C. H. Benedict, partners as aforesaid, a judgment for the sum of one thousand one hundred sixty-seven and $\frac{50}{100}$ dollars, and also for its costs.

That the said Standard Sugar Refinery recovered in said Jackson county circuit court on the — day of ——, 1882, a judgment against the said J. B. and R. A. Melone and C. H. Benedict, partners as aforesaid, for the sum of one thousand forty-two and $\frac{50}{100}$ dollars for its debt, and also for its costs.

That on the — day of ——, 1882, the said Leavenworth Sugar Company recovered in said Jackson circuit court a judgment against said J. B. and R. A. Melone and C. H. Benedict, partners as aforesaid, for the sum of two thousand six hundred eighty and $\frac{48}{100}$ dollars, and also for its costs.

That the said J. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, were then and still are indebted to the firm of P. Lorillard and Company in the sum of twelve hundred thirty-five and $\frac{85}{100}$ dollars for goods and merchandise sold and delivered by them to said firm of Benedict, Melone and Company.

Your orators further say that heretofore executions have
36 been issued on all said judgments against said J. B. Melone, R. A. Melone, and C. H. Benedict, and have been duly returned "*nulla bona;*" that the said J. B. Melone, R. A. Melone, and C. H. Benedict, as partners as aforesaid, as well as each of them individually, were, on February 16th, 1882, and still are hopelessly insolvent and wholly unable to meet their liabilities to your orators and their other creditors.

Your orators further state that after the contracting of said indebtedness, to wit, on the 16th day of February, 1882, the said Richard A. Melone, in the firm name of Benedict, Melone and Company, at Kansas City, Missouri, made, executed, and delivered a certain instrument in writing, by which were granted, bargained, sold, and delivered to said Charles Stewart all the goods, wares, and merchandise of whatever description or character of the said firm of Benedict, Melone and Company situate and being in their storeroom, number 304 Delaware street, in said Kansas City, Missouri, and all their store fixtures, desks, scales, delivery wagans, horses, and harness, and also all notes, accounts, and bills receivable, due or to become due to said firm of Benedict, Melone and Company from any parties whatsoever, in trust, however, for the purpose of securing the said Bank of Kansas City and Kansas City Savings Association, now called "The Bank of Commerce," by which name it is here sued, and the Citizens' National Bank, corporations as aforesaid, in the payment of divers sums of money, amounting in the aggregate to

about nineteen thousand dollars, which was then owing to said banks by the said Benedict, Melone and Company. In said written instrument it was intended to convey, and said instrument purports to convey, to said trustee, for the purposes aforesaid,
37 all the property and assets of every kind and description belonging to said firm of Benedict, Melone and Company, and, among other things, it was provided that said Charles Stewart should enter at once upon the discharge of the duties of his said trust, and take immediate possession of all the property conveyed thereby and convert the same into money in any manner he might think proper, and pay the same, or as much thereof as might be necessary, to said Bank of Kansas City, Bank of Commerce, known by the name of the Kansas City Savings Association, and the Citizens' National Bank, in the discharge of their said debts, within five days after they become due and payable, and any surplus remaining to be paid to the said Richard A. Melone, James B. Melone, and Charles H. Benedict; which said written instrument was duly acknowledged by the said R. A. Melone, one of the grantors thereto, in the same manner as prescribed by law in cases wherein real estate is conveyed in this State, was duly filed for record and recorded in the office of the recorder of deeds of Jackson county, at Kansas City, on the said 16th day of February, 1882, a copy of which written instrument is filed with the original bill herein, the original not being in the possession or under the control of your orators.

Your orators further say that on the said 16th day of February, 1882, simultaneously with the making of said written instrument, the said Charles H. Benedict, one of the members of the firm of Benedict, Melone and Company aforesaid, commenced his action in the circuit court of Jackson county, Missouri, against the said Richard A. Melone and James B. Melone, partners as aforesaid,
38 alleging, among other things, that he, the said C. H. Benedict, plaintiff in the said action, had dissolved the partnership existing between the members of said firm of Benedict, Melone and Company; that the said J. B. Melone had become insolvent; that the said plaintiff, together with the defendants in said action, had control of a large stock of goods and wares and merchandise and debts due said firm, and that said firm was largely indebted to various persons from whom they had purchased goods, and praying the court for the appointment of a receiver for partnership property and for the ascertainment and payment of partnership debts; that upon the hearing of said petition on said day, before the Honorable Turner A. Gill, one of the judges of the circuit court of Jackson county, Missouri, at chambers, said Charles Stewart, trustee in said written instrument, was appointed receiver of the partnership property of the said firm of Benedict, Melone and Company, and immediately qualified and entered upon his duties as such receiver, and thereupon said firm became dissolved and ceased to do business.

Your orators further say that at the time of making said written instrument and of instituting said action for the appointment of a receiver for partnership property the said firm of Benedict, Me-

lone and Company was and still is legally indebted to various other firms and persons besides those mentioned in said written instrument, and then was and still — insolvent and unable to pay all their creditors in full, and that said firm and said Stewart and said respondent banks herein had full knowledge of such insolvency.

39 Your orators further say that said J. B. Melone was a resident of Macon City, Missouri, and possessed of larger means and greater financial credit than his copartners, C. H. Benedict and R. A. Melone, and had furnished the larger part of the capital theretofore used and then invested in the business of the said firm of Benedict, Melone and Company. Being largely interested in business pursuits other than the business of Benedict, Melone and Company, and out of which grave financial complications grew, he, the said J. B. Melone, seeing that it was impracticable for said firm to longer continue business, as they, the said firm, and each of them were hopelessly insolvent, on the — day of February, 1882, and prior to the execution of said instrument and the appointment of said receiver, sent a special messenger from his home, at Macon City, to his said copartners, R. A. Melone and C. H. Benedict, at Kansas City, with written directions to them to make a general assignment of all the partnership property of said firm of Benedict, Melone and Company to said Charles Stewart for the benefit of all their creditors; of all which all the respondents herein had notice before the execution of said written instrument and the appointment of said receiver; but disregarding such express directions and in direct violation of the same and at the instance of said respondent, Charles Stewart, trustee in said written instrument, who urged and insisted that said respondent banks be preferred as creditors and first secured in their said debts and who refused to act as requested by said J. B. Melone unless said respondent banks were so preferred and secured, the said R. A. Melone and C. H. Benedict, after they

40 had consulted their counsel in regard to making a general assignment for the benefit of all the creditors of Benedict, Melone & Company and had employed counsel for that purpose, in consequence of the request and importunities of said Stewart and said respondent banks, executed and delivered said instrument in the firm name of Benedict, Melone & Co., thereby attempting to create such preferences in favor of said banks; that the said J. B. Melone was then ignorant of said attempted preference in favor of said banks, and did not, for months afterwards, know that a general assignment for the benefit of all creditors had not been made in the usual and ordinary way as directed by him, but was led to believe and did believe that his said directions had been followed; and your orators say that the said Jas. B. Melone never authorized the execution of said written instrument in the manner in which it is made, nor has he ever acquiesced in or ratified the acts of his copartners in executing said instrument attempting to create preferences in favor of said respondent banks.

Your orators further say that at the time of making said written instrument to the said Stewart, trustee as aforesaid, it was fully un-

derstood between all the respondents herein that the said firm of Benedict, Melone & Co. was wholly insolvent and was to be immediately dissolved, and that the said Charles Stewart, trustee in said written instrument was to be appointed receiver of the partnership property of said firm, and that notwithstanding there was a defeasance clause inserted in said written instrument, such as is usually contained in deeds of trust in the nature of mortgages, it was, in fact, intended by the aid of said proceedings to settle the partnership and for the appointment of a receiver, to absolutely and fully dispose of all said partnership property, and to appro-
41 priate and dedicate the same to the payment of the debts of said Benedict, Melone & Co. so far as the same would go after first paying said debts to said respondent banks in full.

Your orators further say that the simultaneous action of the said R. A. Melone and C. H. Benedict in making said written instrument in the manner hereinbefore stated and in dissolving said partnership and in having said trustee Stewart appointed receiver of the partnership property was a fraudulent attempt upon their part to evade the provisions of the statute in reference to voluntary assignments for the benefit of creditors, being chapter five of the Revised Statutes of Missouri.

Your orators further state that, by reason of all the premises and of the said statute relating to voluntary assignments for the benefit of creditors, the written instrument aforesaid operated as and is in law and equity a voluntary deed of assignment on the part of said firm of Benedict, Melone & Co. to said Stewart for the benefit of all their creditors, and that by virtue of the same the said firm assigned and conveyed to the said Stewart, as assignee, all their property and assets for the benefit of all their creditors in proportion to their respective claims; that all the property so assigned was then and there delivered to said Stewart in trust under said instrument operating as an assignment in the manner aforesaid, who thereupon accepted the trust and immediately took possession and control of such property under said instrument. Said property and assets were of large value, and out of which said Stewart has realized the sum of about fifty-eight thousand dollars ($58,000), enough to pay all of the creditors of said Benedict, Melone & Co. about sixty cents on the dollar of their demands if the preferences so attempted
42 to be made in said instrument be set aside and said instrument held and declared to be a voluntary assignment for the benefit of all the creditors of said firm.

Your orators further say that under the said instrument, operating as an assignment as aforesaid, it became and was the duty of said Stewart, as assignee, under the provisions of the statute aforesaid, within fifteen days after the execution of said instrument to file in the office of the clerk of the circuit court of Jackson county a full and sworn inventory of the property assigned, to cause the same to be duly appraised, to file in said court within three days after the filing of said instrument for record a bond, with good and sufficient securities, in double the value of the assigned property, conditioned for the discharge in all things of his duties as such as-

signee and the faithful execution of the trust confided to him by said assignment, and to proceed to execute said trust by fixing the time and place for and giving public notice of such time and place of adjusting and allowing demands against the said trust estate, to adjust and allow such demands, to pay all such as may be allowed, in proportion to the amounts thereof, to dispose of the property for that purpose, and from time to time to exhibit his accounts of said trust estate to the said court, and generally to fully execute and faithfully perform said trust according to law.

Your orators further say that, notwithstanding his duty in the premises, said Stewart has wholly and entirely failed and refused to perform any of the duties so required of him under the said provisions of the statute regulating voluntary assignments for the benefit of creditors, and has at all times denied the right of the other creditors of said firm of Benedict, Melone & Co. to share
43 equally with the respondent banks in the distribution of said trust estate held by him as trustee in said instrument, but has proceeded to execute his said trust by virtue and under the powers attempted to be conferred upon him as aforesaid by said written instrument, treating the same as a valid mortgage by Benedict, Melone & Company, securing and preferring said respondent banks to the full amount of their debts against said firm.

Your orators further say that with full knowledge of the rights of your orators and the other creditors of said firm of Benedict, Melone & Co. to an equal distribution of said trust estate of the proceeds thereof among them in payment of their claims the said trustee, Stewart, sold and disposed of all said trust property and effects so assigned to him and received therefor, as aforesaid, the sum of about fifty-eight thousand dollars in money, and after paying the costs and expenses attending the matter has, by virtue of the terms and provisions of said instrument attempting to create said preferences, paid said respondent banks the full amount due them respectively on their said claims, being the sum of about nineteen thousand dollars.

But your orators says that, anticipating legal proceedings by the other creditors of said Benedict, Melone & Company who had been excluded from all participation in that part of said trust fund so devoted to the payment and satisfaction of the claims of said respondent banks, the said Charles Stewart, trustee as aforesaid, demanded indemnity of said banks before paying them, and the said banks fully indemnified him against the demands of your orators and the other creditors of said Benedict, Melone & Company on account of his said action in paying said bank debts in full.

44 And, further, your orators say that said respondent banks received and said respondent Stewart paid the full amounts of their said demands with full knowledge of the rights of your orators and the other creditors of said Benedict, Melone & Company to share equally with them in the proceeds of said trust estate so paid said banks.

Your orators further say that said Stewart, as receiver, in pursuance of his appointment by and under the directions of said circuit court

of Jackson county, Missouri, is proceeding to and has partially paid and distributed the remainder of said trust fund in his hands, after paying said banks in full as trustee in said instrument as aforesaid stated, and arising from the sale of said partnership property to all other creditors of said Benedict, Melone and Company, including your orators, in proportion to their respective demands and in the same way that he would have been required to do had he qualified and acted as assignee according to law, and as to such action of said Stewart in the distribution of said surplus fund your orators here make no complaint and ask no relief.

Your orators further say that at the time of the execution of the said written instrument and the appointment of said Stewart as such receiver the said firm of Benedict, Melone and Company were largely indebted to persons and firms other than said respondent banks and your orators in large amounts, unknown to your orators, which are long since due and unpaid; that said creditors are numerous and many of them non-residents of this State, so that it is impossible to bring them before this court in this action; whereupon your orators bring and file this bill of complaint for the benefit of all
45 said creditors, as well as themselves, who may wish to join herein and contribute to the expenses of this action.

Wherefore your orators pray, in consideration of all the premises, that said written instrument from said Benedict, Melone and Company to said Stewart be adjudged and decreed by this court to be for the benefit of all the creditors of said Benedict, Melone and Company, in proportion to their respective demands, and that the said Stewart and said respondent banks be required to pay into the registry of this court the full amount so paid by said Stewart to said banks, to be distributed under the orders of this court to all the creditors of said Benedict, Melone and Company, in proportion to their respective claims, as equity and justice may require.

Or that this court may, in consideration of all the premises, adjudge and declare that said written instrument to the said Stewart be a general assignment for the benefit of all the creditors of the said firm of Benedict, Melone and Company, in proportion to their respective claims, and that said Charles Stewart may be declared and decreed to be the assignee of said firm of Benedict, Melone and Company for the benefit of all their creditors; that he may be required to give bond as such assignee as in such cases provided by the statute of this State regulating voluntary assignments for the benefit of creditors; that he be required to fully account for all sums of money and property of said firm of Benedict, Melone and Company so paid the respondent banks by way of preferences and by virtue of said written instrument; that he be required to adjust and allow all legal claims and demands against said firm which were owing at the time of making said written instrument; that he be required to distribute the said trust fund so paid respondent
46 banks as trustee aforesaid to the payment of the claims of all the creditors of said Benedict, Melone and Company, in proportion to their respective amounts thereof, and for that purpose that the said respondents, The Bank of Kansas City, The Bank of

Commerce, and The Citizens' National Bank, be compelled to fully account for and pay over to the said Stewart, as such assignee, all sums of money and property received by them from said Stewart under and in pursuance of the terms expressed in said written instrument as to the court may seem most equitable and just; and your orators will ever pray.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to the said Charles Stewart, the Bank of Kansas City, the Bank of Commerce, the Citizens' National Bank, James B. Melone, Robert A. Melone, and Charles H. Benedict, thereby commanding them and each of them, at a certain time and under certain penalty therein to be named and limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further orders, directions, and decree therein as to this honorable court shall seem meet.

DOBSON AND DOUGLASS,
LATHROP AND SMITH,
TOMLINSON AND ROSS,
GAGE, LADD AND SMALL,
STRONG AND MIDDLEBROOK,
TRABER AND GIBSON,
Solicitors for Complainants.

C. L. DOBSON, *Of Counsel.*

47 Afterwards, at said regular May term of said court, and on the 31st day of May, A. D. 1883, the following entry appears upon the order book of said court, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

Now, at this day, come the defendants, by their attorneys, and file motions to remand this cause to the circuit court of Jackson county.

Said motions to remand said cause to the circuit court of Jackson county are in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

UNION NATIONAL BANK OF CHICAGO *et al.*, Complainants,
against
BANK OF KANSAS CITY *et al.*, Defendants.

And now come Bank of Kansas City, Bank of Commerce, and Citizens' National Bank, defendants in the above cause, and move the court to remand said cause to the circuit court of Jackson county, at Kansas City, Missouri, from whence it has been removed, for the reason that it appears from the bill of complaint filed herein that all the property of said Benedict, Melone & Co. affected by these pro-

ceedings has been placed in the custody of said Stewart as a receiver duly appointed by said State court, who has been since such appointment and is now engaged in the discharge of the duties of his office as such receiver, and that under the orders and direction of said State court he has taken charge of said partnership property and has been distributing the same among the complainants
48 and other creditors of said firm, the said creditors, including these complainants, having submitted their claims against said firm of Benedict, Melone & Co. to the jurisdiction of said court.

And for the further reason that the proceedings herein commenced are merely auxiliary to those already commenced in said State court, wherein said Stewart was appointed receiver, and for the foregoing reasons and each of them said cause is not removable in law.

TICHENOR, WARNER & DEAN,
Solicitors for said Bank of Kansas City, Bank of Commerce, & Citizens' National Bank.

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Equity.

THE UNION NATIONAL BANK and Others, Complainants,
vs.
THE BANK OF KANSAS CITY and Others, Respondents.

Charles Stewart, one of the above-named defendants, being duly sworn, on his oath says: I am the receiver of the property and the effects of Benedict, Melone & Co., a partnership consisting of James B. Melone, Richard A. Melone, and Charles H. Benedict. I was appointed such receiver by the Jackson county circuit court, in division No. 1, at Kansas City, Mo., on January 6th, 1883, under the orders of the Jackson circuit court, at Kansas City, Mo. After giving the notice required by the order of said court I proceeded to adjust and allow claims against said copartnership property. One hundred and fourteen claimants presented demands for allowance, said claimants being copartnerships, corporations, and individuals. Of the claim-
49 ants so presenting claims for allowance sixty-four are citizens of the State of Mo., the claims so presented by citizens of this State amounting to the sum of sixty-nine thousand and thirty-five dollars. The total amount of all claims as presented to date is eighty-seven thousand three hundred and ninety-two and $\frac{45}{100}$ dollars. The court ordered me to pay a dividend of thirty-three and one-third per cent. on all approved claims. I made the payments as ordered. The complainants in this case presented their claims for allowance; said claims were allowed and dividends paid thereon. The above debts are exclusive of the debts due to the Bank of Kansas City, Kansas City Savings Association, and Citizens' National Bank.

CHARLES STEWART.

Subscribed and sworn to before me on this May 31st, 1883.
[SEAL.]
WARREN WATSON,
Com'r U. S. Cir. C't, W. D. Mo.

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

THE UNION NATIONAL BANK and Others, Complainants,
vs.
THE BANK OF KANSAS CITY and Others, Respondents.

This day came Charles Stewart, one of the defendants in the above cause, and moves the court to remand this cause to the circuit court of Jackson county, Missouri, for the reason that from the allegations in said original petition filed in the State court and from the allegations in the amended substituted bill of complaint filed in this court this court has no jurisdiction, and the circuit court of Jackson county, Missouri, alone has jurisdiction. All the property
50 sought to be affected is and was in the possession of defendant, Charles Stewart, as receiver of the firm of Benedict, Melone and Company, said Stewart being appointed such receiver in the case of Chas. H. Benedict, plaintiff, against Richard A. Melone and James B. Melone, defendants, and that said cause is still pending in the State court. This court has no jurisdiction to decree that part of the $58,000.00 in the hands of the defendant Stewart, to wit, $19,000.00, shall be distributed under the orders of this court as an assignment, while the remainder of said fund, to wit, $39,000.00, shall be distributed under the receivership in the State court. This court has no jurisdiction for the reason that if the written instrument set out in the original petition and filed therewith be a voluntary assignment for the benefit of all the creditors of Benedict, Melone and Co., then all such creditors are jointly interested under said deed and all must join in the suit, and the following persons were and are creditors of Benedict, Melone —, and have proved their debts, as shown by Exhibit "A," hereto attached and made a part of this motion, and said creditors are all citizens and residents of the State of Missouri and jointly interested with complainants. Said complainants proved their debts against said firm in the case of Chas. H. Benedict, pl'ff, *vs.* Richard A. Melone and James B. Melone, defendants, and the circuit court of Jackson county, Missouri, ordered and directed said Stewart, as receiver, to pay to them a dividend on their claims so allowed, which said dividend said Stewart paid, and complainants thereby became parties to said suit and ought to know and did know who were the other creditors of said Benedict, Melone and Co.

TICHENOR, WARNER AND DEAN,
KARNES AND ESS, *For D'f't Stewart.*

51 And afterwards, at said May term of said court, and on the 11th day of June, A. D. 1883, the following entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come the parties, by attorneys, and the motion to remand being called for hearing the same is argued by counsel, and the ar-

gument not being concluded at the hour of adjournment is postponed until to-morrow morning.

And afterwards, at said term of said court, and on the 12th day of June, A. D. 1883, the following further entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

Again come the parties, by solicitors, whereupon the argument of the motion to remand was resumed, and, being completed, said motion is submitted to the court and taken under advisement.

Afterwards, at said term of said court, and on the 18th day of June, A. D. 1883, the following entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

Now, at this day, the court, being fully advised of and con-
52 cerning the motion to remand this cause to the court from whence it came, doth order that said motion be denied.

Afterwards, in vacation of said court, and on the 27th day of August, A. D. 1883, the following entry appears upon the order book of said court, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come the defendants, The Bank of Commerce, The Bank of Kansas City, and Charles M. Stewart, by their solicitors, and file answer herein.

Said answer is in words and figures as follows, to wit:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Chancery.

The answer of Charles Stewart, The Bank of Commerce, The Bank of Kansas City, & The Citizens' National Bank, the defendants, to the bill of complaint of the complainants, The Union National Bank of Chicago, Illinois; Henry C. Bannard and Bennett Lyman, alleging themselves to compose the Firm of Bannard, Lyman & Co.; Peter Lorillard, Charles Seedler, and Pierre Lorillard, Jr., alleging themselves to compose the firm of P. Lorillard & Co.; The Boston Sugar Refining Company, styling itself a corporation; Mark W. Mendel and Emanuel W. Mendel, styling themselves a firm under the name of Mendell & Bros.; John Arbuckle and William V. R. Smith, styling themselves a firm under the name of Arbuckle Bros.; The Continental Sugar Refinery Com-

pany and The Standard Sugar Refinery Company, styling themselves corporations, and The Leavenworth Sugar Refinery Company, styling itself a corporation, for themselves and others,
53 styling themselves creditors of James B. Melone, Richard A. Melone, and Charles H. Benedict, composing the firm of Benedict, Melone & Co.

These defendants, now and at all times, reserving all manner of benefit or advantage to themselves of exception to the many errors and insufficiencies in the said amended bill contained, in answer thereto, or unto so much thereof or such parts thereof as these defendants are advised is material for them to make answer unto, answer and say: As to whether the Union National Bank of Chicago was or is a banking corporation organized under the laws of the United States in regard to national banks these defendants have no knowledge, and as to whether said bank is a citizen of the State of Illinois these defendants have no knowledge, and therefore require strict proof of said allegation in said bill. As to whether said Peter Lorillard, Charles Seedler, and Pierre Lorillard were at said times or were at any time partners under the firm name of P. Lorillard & Co. and as to whether they are citizens of the State of New York these defendants have no knowledge, and therefore require strict proof of the allegations of said bill on that point. As to whether the said Boston Sugar Refining Company was or still is a corporation organized under the laws of Massachusetts and as to whether said Boston Sugar Refining Company was and still is a citizen of the State of Massachusetts these defendants have no knowledge, and therefore these defendants require strict proof of the allegations of said bill on this point. As to whether said Mark W. Mendell and Emanuel W. Mendell were then and still are partners doing business under the firm name of M. W. Mendell & Bro., in the city of New York,
and as to whether they were then or are now citizens of the
54 State of New York these defendants have no knowledge, and therefore these defendants require strict proof of said allegations of said bill. As to whether Henry C. Bannard and —— Lyman were then or still are partners doing business under the firm name of Bannard, Lyman & Co., in the State of Illinois, and as to whether they are residents or citizens of the State of Illinois these defendants have no knowledge, and therefore deny the allegations of said bill on this point and require strict proof thereof. As to whether John Arbuckle, Charles Arbuckle, and William V. R. Smith were then or still are partners doing business under the firm name of Arbuckle Bros., in the city of New York, and as to whether they or any of them were or are citizens of the State of New York these defendants have no knowledge, and therefore these defendants deny said allegations in the said bill and require strict proof thereof. As to whether the Continental Sugar Refining Company was then or still is a corporation organized under the laws or with its office or chief place of business in the State of Massachusetts and as to whether it was or still is a citizen of the State of Massachusetts these defendants have no knowledge, and therefore these defendants deny

said allegations in said bill and require strict proof thereof. As to whether the Leavenworth Sugar Refinery Company was then or still is a corporation duly organized under the laws of the State of Kansas, with its chief office or place of business in the State of Kansas, these defendants have no knowledge, and therefore these defendants deny all of the allegations of said bill on that point and require strict proof thereof. As to whether the said Leavenworth Sugar Refinery Company was then or still is a citizen of the State of Kansas these defendants have no knowledge, and therefore
55 require strict proof of all the allegations of said bill on that point.

The defendants admit that the Bank of Kansas City and the Bank of Commerce were, at the times mentioned in the amended bill and still are, corporations duly organized under the laws of the State of Missouri, with their chief offices or places of business in Missouri, and that they are citizens of the State of Missouri.

These defendants admit that the said Bank of Commerce was formerly known as the Kansas City Savings Association prior to March 1st, 1882. The name of said bank, the Kansas City Savings Association, was not changed, but the Bank of Commerce was a new corporation organized under the laws of the State of Missouri, as these defendants are advised and believe and so charge. These defendants admit that the said James B. Melone and Richard A. Melone and Charles H. Benedict were, on February 16th, 1882, engaged in the wholesale grocery business in Kansas City, Missouri, under the firm name of Benedict, Melone and Co. James B. Melone, Richard A. Melone, and Charles H. Benedict and these defendants are citizens of the State of Missouri. The said James B. Melone resides in Macon county, Missouri, and the other defendants, Charles H. Benedict, Richard A. Melone, and this defendant, reside in Kansas City, Missouri. These defendants admit that the defendant, The Citizens' National Bank, was and still is a corporation duly organized under the laws of the United States, with its chief office or place of business at Kansas City, Missouri, and that it is a citizen of the State of Missouri. These defendants admit that on the 13th day of December, 1882, the Union National Bank of Chicago recovered in the Jackson circuit court, in Jackson county, Missouri, a judgment against the said James B. Melone, Richard A. Melone, and Charles H. Benedict in the sum of $1,509.43 for his debt
56 and also for costs of suit. These defendants admit that on the 13th day of December, 1882, the said Henry C. Bannard and Bennett Lyman recovered in the Jackson circuit court, in Jackson county, Missouri, a judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict for the sum of $652.89 for their debt and also for their costs. These defendants admit that on the 13th day of December, 1882, the said Marx W. Mendel and Emanuel Mendel recovered in the Jackson circuit court, in Jackson county, Missouri, a judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict in the sum of $970.68, not in the sum of $971.68, as charged in said bill of complaint. Said judgment also includes costs of suit. These defendants admit that on the 18th

day of December, 1882, the said Boston Sugar Refining Company recovered in the Jackson circuit court, in Jackson county, Missouri, a judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict in the sum of $2,453.53 for its debt and also for its costs. Defendants admit that on the 9th day of December, 1882, John Arbuckle, Charles Arbuckle, and William V. R. Smith recovered in the Jackson circuit court, in Jackson county, Missouri, judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict for the sum of $1,766.58 and also for their costs. Defendants admit that on the 9th day of December, 1882, said Continental Sugar Refining Company recovered in the Jackson circuit court, in Jackson county, Missouri, judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict for $1,167.94 and also for its costs. These defendants admit that on the 9th day of December, 1882, the Standard Sugar Refining Company recovered in the Jackson circuit court, in Jackson county, Missouri, judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict
57 for the sum of $1,042.82 for its debt and also for its costs. These defendants admit that on the 13th day of December, 1882, the said Leavenworth Sugar Refining Company recovered in the Jackson circuit court, in Jackson county, Missouri, a judgment against James B. Melone, Richard A. Melone, and Charles H. Benedict for the sum of $2,680.48 for its debt and also for its costs. As to whether the said Benedict, Melone & Co. were then or are now indebted to the said P. Lorillard & Co. in the sum of $1,235.85 or any other sum these defendants have no knowledge, except that the said firm have proved the debt against the said firm of Benedict, Melone & Co., as hereinafter stated; and as to whether this is the same debt, or otherwise, these defendants have no knowledge, and these defendants therefore deny the said allegations in the said bill and require strict proof thereof. These defendants deny that heretofore or at any time executions have been issued on said judgments or on any of them against said James B. Melone, Richard A. Melone, Charles H. Benedict, or either of them. No execution has been issued on any of said judgments. These defendants aver that no execution or executions have been returned unsatisfied on all or any of the judgments set out in complainants' bill of complaint. As to whether the said James B. Melone, Richard A. Melone, and Charles H. Benedict, either as partners or individually, were insolvent or unable to meet their debts or obligations on the 16th day of February, 1883, these defendants did not then have any knowledge, but these defendants then believed and for sixty days thereafter continued to believe, on the information of others, that the said firm of Benedict, Melone and Co. were not only solvent, but that after winding up their copartnership and paying all the copartnership debts there would be left a large surplus for division among the part-
58–65 ners; but these defendants now believe that the firm of Benedict, Melone & Co. did not have, on February 16th, 1882, property and assets sufficient to pay all their assets in full. As to when the several indebtednesses of the several complainants accrued, and as to whether it was before or after the 16th day of February, 1882,

these defendants have no knowledge, and therefore deny the allegations of the bill on this point and require strict proof thereof. These defendants admit that on the 16th day of February, 1882, Richard A. Melone, in the firm name of Benedict, Melone & Co., executed and delivered to this defendant, Charles Stewart, a deed of trust in the words and figures as follows:

(Deed omitted in printing, per stipulation. See p. 444.)

Which said chattel mortgage or deed of trust was filed for record and duly recorded in the office of the recorder of deeds of Jackson county, Missouri, at Kansas City, on the 16th day of February, 1882, at the hour of 7.10 p. m., in Personal Property Book "B 9," pages 155 to 159.

These defendants admit that the said Richard A. Melone executed, acknowledged, and delivered said deed of trust to this defendant, Charles Stewart, in the name of the firm of said Benedict, Melone & Co. This is the only deed of trust made by said firm to this defendant, Charles Stewart, trustee. These defendants admit and charge that the said deed of trust recites that it is made for the purpose of securing certain debts therein named. These defend-
66 ants say that immediately after the making of said deed of trust to this defendant, Charles Stewart, he, said Stewart, took immediate possession of all the property named in the said deed of trust, such possession being exclusive of all others. These defendants admit that on the 16th day of February, 1882, that Charles H. Benedict, one of the members of the firm of Benedict, Melone & Co., commenced his action in the circuit court of Jackson county, Mo., against James B. Melone and Richard A. Melone, but these defendants deny that the commencement of said action was simultaneous with the making of said deed of trust. As to the allegations in the said bill of complaint as to the contents of said petition so filed in the Jackson circuit court, these defendants have no knowledge, and they therefore deny the said allegations of the bill and require strict proof thereof. These defendants admit that at the time of the making of said deed of trust, and at the time of filing said petition, the firm of Benedict, Melone & Co. were largely indebted to other persons besides the complainants in this case. These defendants attach to this answer a statement of the names of the creditors of Benedict, Melone & Co., as well as their places of residence and their citizenship, as well as the amounts of their several debts, which these defendants ask to be considered as part of their answer. As to the allegations in the said bill that the said firm of Benedict, Melone & Co. were insolvent on the 16th day of February, 1882, these defendants have no knowledge, and they therefore deny all the allegations in the said bill on that point; and these defendants say that on February 16th, 1882, and up to April 1st, 1882, the defendant, Stewart, and the other defendants had no notice, knowledge, information or belief that the said firm was insolvent or unable to pay their debts in full. At
67 the time of the making of said deed of trust and at the time of paying said debts thereby secured, the defendant, Charles

Stewart, and the defendant banks fully believed that the said assets of said firm of Benedict, Melone & Co. would be more than sufficient to pay all the firm debts in full, and that after paying all their debts in full there would be left a large surplus for division among the partners of not less than $15,000.00. These defendants had no knowledge, information, or belief to the contrary till after the said secured debts were paid. These defendants admit that James B. Melone was a resident of Macon City, Mo., but as to whether the said James B. Melone was possessed of larger means or greater financial credit than C. H. Benedict or Richard A. Melone, and as to whether he had furnished the greater part of the capital of said firm then in the said business, these defendants have no knowledge, and therefore they deny the said allegations in the said bill. These defendants believe, and therefore admit, that the said James B. Melone was largely interested in business pursuits other than that of Benedict, Melone & Co. These defendants believe and so charge that the said James B. Melone was connected with the Farmers' and Traders' Bank, a banking copartnership at Macon, Mo., and also with the Macon Savings Bank at Macon, Mo., being cashier of the said bank; and the said James B. Melone was connected with the Macon Coal & Mining Company, all which corporations failed in business, as these defendants are informed and believe and so charge. As to whether the said James B. Melone saw that it was impracticable for the said firm of Benedict, Melone & Co. to continue in business, and as to whether it was impracticable to continue in business, these defendants have no knowledge, and they
68 therefore deny all the allegations of the bill on this point.

As to the allegations in the said bill that the said firm and each of the members were insolvent these defendants have no knowledge, and they therefore deny the allegations of the said bill on this point, and they require strict proof thereof. These defendants say they have no knowledge and they therefore deny that the said James B. Melone sent a special messenger from his home in Macon City, Mo., or elsewhere, to his said copartners, Richard A. Melone or Charles H. Benedict, or either of them, at Kansas City or elsewhere. These defendants have no knowledge and they therefore deny that the said James B. Melone sent written or other instructions to the said Charles H. Benedict or Richard A. Melone to make a general assignment of all or any part of the partnership property of said firm to this defendant, Charles Stewart, or any one else, for the benefit of all of the creditors of said firm. These defendants deny that at the time shown in the bill or at any other time they had any notice, knowledge, information, or belief that any such directions or any directions to make a general assignment had been sent by James B. Melone to the said Richard A. Melone or Charles H. Benedict or to any one. These defendants deny that the defendants, Charles H. Benedict and Richard A. Melone, or either of them, disregarded or violated any express direction, or any other direction, of James B. Melone, as none were ever given. These defendants insisted that said deed of trust should be made. The defendant, Charles Stewart, did not refuse to act as receiver or trustee unless said

banks were first secured. These defendants admit that the said Richard A. Melone and Charles H. Benedict consulted their counsel in regard to making a general assignment for the benefit of the creditors of Benedict, Melone & Co., and
69 the said Charles H. Benedict and Richard A. Melone concluded of their own motion not to make a general assignment for the benefit of their creditors, and no such assignment was ever made, so far as these defendants are advised and know; and the said Charles H. Benedict and Richard A. Melone intended to make and did make a deed of trust to this defendant, Charles Stewart, in trust to secure the debts due to the respondent banks in this case. Said deed of trust was made in the name of the firm. The firm name was signed thereto by Richard A. Melone, one of the partners in the said firm, and the said Richard A. Melone and Charles H. Benedict had no authority from James B. Melone to make a general assignment for the benefit of creditors. The said Richard A. Melone had authority to make deed of trust to this defendant to secure the firm debts as the said deed of trust was made. These defendants admit that the said Richard A. Melone made the said deed of trust named in the bill, and set out therein and copied in this answer; and these defendants admit that the said Richard A. Melone intended to make said deed of trust for his said firm. As to whether the said James B. Melone was ever ignorant of said deed of trust, called a preference in said bill of complaint, and as to how long he remained so ignorant thereof these defendants have no knowledge, and they therefore deny all of the allegations of said bill on this point. These defendants say that it is not true that James B. Melone never authorized the execution of said deed of trust as made. These defendants do not know whether he has ever ratified said deed of trust, but these defendants believe and aver that no ratification by him was ever necessary. These defendants deny that at the time of the making of said deed of trust,
70 called a written instrument in said bill of complaint, it was fully or at all understood between all or any of the respondents that the said firm of Benedict, Melone & Co. was wholly or at all insolvent. It was not at that time understood that the firm of Benedict, Melone & Co. was insolvent. It was not then understood that the firm was to be immediately dissolved. It was not at the time of the making or delivery of the said deed of trust understood that this defendant, Charles Stewart, was to be appointed receiver of the firm of Benedict, Melone & Co. These defendants admit that there was and is a defeasance clause in said written instrument, such as is usual in mortgages or deeds of trust. These defendants admit that the purpose of the suit commenced by Charles H. Benedict against James B. Melone and Richard A. Melone was to settle the said copartnership, to ascertain its debts and pay them, to take and state the accounts between the said partners, and to pay what was due to each partner, and there was no other intention by any one. At the time of the appointment of this defendant, Charles Stewart, as receiver of the partnership property of Benedict, Melone & Co. defendants were informed and believed that the said firm

had assets above all its liabilities of at least $15,000.00. The defendants deny that the action of said Charles H. Benedict and Richard A. Melone (in the said bill charged to be simultaneous) in making said deed of trust, called a written instrument in said bill, in the manner set out in said bill or in any other manner, or the dissolving of said partnership, or the appointment of the defendant, Charles Stewart, as the receiver of said firm, were all of them together, or any one of them, a fraudulent attempt or any attempt on the part of these defendants or any of them to avoid the provisions of the statute of this State in respect to voluntary assignments.

71 These defendants deny that, by reason of the premises stated in the said bill of complaint, or by reason of the statute of Missouri relating to voluntary assignments for the benefit of creditors, or for any other cause, the said deed of trust to this defendant, Charles Stewart, called in the said bill of complaint a written instrument, ever operated as a voluntary assignment. These defendants deny that it is in law or equity a voluntary assignment on the part of Benedict, Melone & Co. to this defendant, Charles Stewart, for the benefit of all their creditors. These defendants deny that by virtue of said deed of trust, called in the said bill a written instrument, or by virtue of anything else set up in the said bill of complaint, the said firm of Benedict, Melone & Co. assigned or conveyed to this defendant, Charles Stewart, as assignee, all their property or effects for the benefit of all their creditors in proportion to their respective demands. These defendants admit that all the property mentioned in the said deed of trust was delivered to this defendant, Charles Stewart, first as trustee under the said deed of trust, and afterwards as receiver, and the said property was held by this defendant, Charles Stewart, not alone under said deed of trust, but under the said deed of trust and under the appointment of this defendant, Charles Stewart, as receiver, and under the orders of the Jackson circuit court of Jackson county, Missouri. All of the said property was first delivered to this defendant, Charles Stewart, as trustee under said deed of trust, and thereafter this defendant, Charles Stewart, was appointed receiver of said firm under the orders of the Jackson circuit court, and thereupon this defendant, Charles Stewart, ever afterwards held said property both under the said deed of trust and under the appointment and the orders

72 of the Jackson circuit court of Jackson county, Missouri. The defendant, Charles Stewart, accepted the trust under the said deed of trust, and afterwards also accepted the said receivership under the orders of the Jackson circuit court. This defendant, Charles Stewart, took charge of all of said property under the said deed of trust and under the said receivership, and this defendant, Charles Stewart, under the orders of the Jackson circuit court of Jackson county, Missouri, filed a true, full, and complete inventory of all the property and assets of said firm, which said inventory embraced all of the property described in the said deed of trust. The said order to file an inventory was made by the Jackson circuit court on February 17th, 1882, and the said inventory was filed on the 6th day of March, 1882. These defendants admit that said property

and assets were of large value, and that out of said assets the defendant, Charles Stewart, under the orders of the Jackson circuit court and under the terms of said deed of trust, has realized the sum of $58,200.00. The entire fund is now, and always has been, under the orders of the Jackson circuit court, sitting at Kansas City, Missouri, and this defendant, Charles Stewart, is amenable to said court alone for what he may do or has done with the said fund or property, and not to any other court or in any other proceeding. These defendants admit that if the said deed of trust or chattel mortgage, called in the said bill of complaint a written instrument, had been an assignment for the benefit of creditors, then it would have been the duty of the defendant, Charles Stewart, to file in the office of the clerk of the circuit court of Jackson county, Missouri, a full and comple inventory of the property assigned. The defendant, Charles Stewart, as receiver, did file in the office
of the clerk of the circuit court of Jackson county, Missouri,
73 in the case of Charles H. Benedict, plaintiff, against Richard A. Melone and James B. Malone, defendants, a full, true, and complete inventory of all the property and effects of the said firm of Benedict, Melone & Co., including all accounts, notes, and drafts and all other property of every kind, including all that covered by the said deed of trust. The said Jackson circuit court, in the said cause of Charles H. Benedict, plaintiff, against James B. Melone and Richard A. Melone, defendants, required this defendant, Charles Stewart, as such receiver, on February 17th, 1882, to file in the said cause his bond, with securities to be approved by said court, in the sum of one hundred and twenty-five thousand dollars, conditioned for the faithful performance of all the duties of said office of receiver of said Benedict, Melone & Co.; and the defendant, Charles Stewart, filed said bond on February 17th, 1882, with securities as required, which said bond was approved by court. Said court did not require, and this defendant, Charles Stewart, did not make, any other or further bond than that above mentioned as filed and approved by said court. On February 21st, 1882, the said Jackson circuit court, in the said cause of Charles H. Benedict, plaintiff, against James B. Melone and Richard A. Melone, defendants, duly made and entered of record a certain order requiring the defendant, Charles Stewart, to sell all of the property of the firm of Benedict, Melone & Co. and requiring said Stewart to file in the said cause an inventory of all the property of said firm. On March 6th, 1882, said Charles Stewart filed a full and complete inventory of all the property of said firm, including all the property at cost price, and carriage and notes, accounts, and debts due at their face value, a copy of which said
inventory is filed with this answer and made a part hereof,
74 marked Exhibit "A." The said property so inventoried embraced the stock of merchandise, all the notes, accounts, and bills receivable and store fixtures belonging to the firm of Benedict, Melone & Co., being the same property mentioned in the said deed of trust called in the bill of complaint a written instrument. These defendants charge that the property so inventoried was the property of the said firm, was subject to the deed of trust to the three defend-

ant banks, and the said inventory embraced all the property known to the said Stewart and belonging to the said firm, and all of said property was sold by the defendant, Charles Stewart, and the notes and accounts collected under the orders of the Jackson circuit court, and not otherwise. The defendant, Charles Stewart, did not make or file any other or further inventory or bond except those set out above, and these defendants charge that the said defendant, Charles Stewart, was not required to make any other or further bond or inventory by the orders of the Jackson circuit court or by said deed of trust or by law. The defendants charge that on December 8th, 1882, the Jackson circuit court in the said cause made its order that the defendant, Charles Stewart, proceed to ascertain the names of the creditors of the firm of Benedict, Melone & Co. and the several amounts of their claims and the nature of their claims, and to this end the said court ordered in the said cause that this defendant, Charles Stewart, as receiver, give notice of a time and place for the exhibition and allowance of demands against the copartnership assets and effects in the hands of the said Stewart as receiver; that such notice be mailed to all persons, copartnerships, or corporations claiming to be creditors of said firm of Benedict, Melone & Co., and that such notice be published for twenty days
75 in the Kansas City Times and the Kansas City Journal, specifying a time and place for the exhibition and allowance of claims against the said partnership assets, and that the said creditors appear at the time and place so to be specified and lay before the said receiver the nature and amounts of their several demands due them from the said firm of Benedict, Melone & Co.; and it was further ordered that in case the receiver entertain any doubts as to the validity of any claim, then such claim should not be allowed, but should be reported to the court for its action in the premises; and the said court further ordered that the said Stewart should report to said court any action taken under the said order and what claims were allowed under the said order and what claims were doubtful.

The defendants, further answering, say that the said Stewart gave the notice required by said order of said court; that he fixed the 6th day of January, 1883, as the time, and the office of Karnes & Ess, in Kansas City, Missouri, as the place, for the exhibition and allowance of claims against the said estate, and at the same time and place certain parties appeared and presented their claims, some of which were doubtful and some were allowed; all of which facts said Stewart reported to the said circuit court of Jackson county, Missouri, which said report and the names and places of residence and citizenship of said claimants has been copied by this defendant, Charles Stewart, and is attached to this answer and made a part hereof, marked Exhibit "B;" and afterwards the Jackson circuit court of Jackson county, Missouri, allowed other claims against the estate and effects of said Benedict, Melone & Co., and these defendants attach to this answer a list giving the names of the creditors, their
76 places of residence and citizenship, and the amount of their demand; and afterwards, on the 22nd day of January, 1883, said Jackson circuit court made its order in the said cause that this

defendant, Charles Stewart, pay out of the assets in his hands a dividend of thirty per cent. to all creditors having claims approved and allowed, and the said dividends were duly paid by the said Stewart, as ordered by the said court. This defendant, Charles Stewart, has not otherwise proceeded to adjust or allow claims or demands against the effects in his hands, except as required by the said orders of the said court, as above stated. The defendant, Charles Stewart, has not proceeded to pay any claims, except as ordered by the said court, excepting the claims to the defendant banks. The defendant, Charles Stewart, has not disposed of the property of said firm except as ordered by the said court; and this defendant has in all things exhibited his account to the said court in the said cause, but not otherwise. The defendants submit that the said Charles Stewart is not bound by law or otherwise to proceed to adjust or allow or pay claims otherwise than is ordered by the said Jackson circuit court in the said cause. The defendant, Charles Stewart, has exhibited his accounts to the circuit court of Jackson county, Missouri, in the said cause of Charles H. Benedict, plaintiff, against James B. Melone and Richard A. Melone, defendants, and not otherwise. The defendant, Charles Stewart, has executed the said trust faithfully and according to the orders of said court. These defendants charge that the defendant Stewart owes no duty to any one under the statute of Missouri regulating voluntary assignments. The defendants aver and charge that the said Benedict, Melone & Co. did not make any voluntary assignment to the defendant, Charles Stewart; and the said circuit court of Jackson county
77 has not ordered the said Stewart to do any act or perform any duty or supposed duty under the statute law of Missouri regulating voluntary assignments. These defendants charge that the complainants in this case are not entitled to share at all in the said deed of trust called in the said bill a written instrument and therein claimed to be a voluntary assignment. These defendants did not at any time have full knowledge or any knowledge or belief that the complainants or any of them, or any other creditors of said firm of Benedict, Melone & Co., had any right to share at all or in any degree in the said deed of trust or in the proceeds thereof, or in any other way. The defendant, Charles Stewart, sold and disposed of all the property conveyed to him under the said deed of trust and taken possession of by him under the said orders of the Jackson circuit court in the said cause wherein this defendant was appointed receiver; and this defendant has received the sum of $58,200.00 for goods sold and choses in action collected, and the said goods have been sold and the accounts collected under the orders of the Jackson circuit court, and not otherwise. This defendant, Charles Stewart, has paid the costs and expenses of the sale of said goods and the collection of said accounts and said debts under the orders and subject to the control of the Jackson circuit court, and not otherwise. The defendants charge that the said Stewart took possession of said stock of goods, wares, and merchandise at the time of the execution of said deed of trust, and when he took possession of said stock and property of said firm it was subject to

the said deed of trust, and that the debts therein secured were preferred claims; and the defendants charge that on the 8th day of March, 1882, the defendant, Charles Stewart, paid to the
78 Kansas City Savings Association the sum of eleven thousand four hundred and ninety-eight and $\frac{44}{100}$ ($11,498.44) dollars, being the full amount of said debt so due to it; and at the same time said Stewart paid to the Bank of Kansas City the sum of five thousand nine hundred and fifty-two and $\frac{23}{100}$ ($5,952.23) dollars, being the full amount of the debt due to it; and at the same time said Stewart paid to the Citizens' National Bank the sum of fourteen hundred and eighty-five dollars ($1,485.00), being the full amount due to it. The defendants, further answering, say that John Plankington, P. D. Armour, A. W. Armour, H. O. Armour, K. B. Armour, William Plankington, and W. P. Alcutt, believing that the said deed of trust so made by said Benedict, Melone & Co., by Richard A. Melone, one of the members of said firm, called — complainants in bill of complaint a written instrument, was fraudulent as to the creditors of said Benedict, Melone & Co., obtained leave of the Honorable Turner A. Gill, judge of the circuit court of Jackson county, Missouri, and before whom and by whom said Stewart had been appointed receiver of said firm, to bring an attachment suit against the firm of Benedict, Melone & Co. and to attach in the hands of the defendant Stewart all property and money of the said firm; and on February 17th, 1882, the parties aforesaid filed in the office of the clerk of the circuit court of Jackson county, Missouri, their petition suing on an account for goods, wares, and merchandise sold and delivered by them to the said Benedict, Melone & Co.; and the said parties then and there filed their affidavit and bond for attachment, said affidavit stating that the defendants, Benedict, Melone & Co., had fraudulently conveyed and assigned their property andeffects so as to hinder and delay their creditors, and the said attachment was brought for the reason that the deed of trust
79 so made by Benedict, Melone & Co. to the defendant Stewart for the defendant banks was fraudulent as to the creditors of said Benedict, Melone & Co.; and afterwards, on March 3rd, 1882, John H. Garth, of Hannibal, Missouri, obtained a like leave of court and brought a like suit in attachment and on the same ground, and said attachment suits were served on the days on which the said several writs of attachment were issued, to wit, on February 17th, 1882, and on March 3rd, 1882, and on March 8th, 1882, said Stewart had in his hands the sum of $20,000.00 arising from the sale of goods and the collection of notes and accounts of said firm, and the said debts so secured were drawing interest at the rate of six per cent. per annum, which would amount to about one hundred dollars a month; and, in order to save this defendant harmless by reason of the said attachment suits and likewise to save the creditors harmless and to save the said interest during what appeared to be a protracted litigation then beginning, and because all the debts so to be paid were then all of them not due, the defendant Stewart demanded from the said banks indemnity from them for thus making payment before the maturity of some of the paper; and the said banks rebated all

interest from that time up to the maturity of each note or bill of exchange secured by said deed of trust called in the said bill a written instrument. At the time of making such payment to the defendant banks said Stewart fully expected to be able to pay from the assets of the said firm of Benedict, Melone & Co. all the creditors of said firm in full within thirty days next following said March 8th, 1882; but the said defendant Stewart did not anticipate any other or further or different legal proceedings except an attack upon said deed of trust for fraud by and through said attachment
80 proceedings. These defendants charge that the said attachment suits were tried in the Jackson circuit court, in Jackson county, Missouri, on pleas in abatement to the said attachments, and the said pleas in abatement were sustained and the said attachments dissolved and the said plaintiffs in the said suits were adjudged to pay all costs of said attachment proceedings. The defendant banks indemnified the said Stewart from all loss or damage by reason of said Stewart paying said debts so secured by said deed of trust. The defendants deny that the said respondent banks received or that the defendant Stewart made the payments aforesaid with full knowledge or any knowledge or any information of any rights of the complainants or any one else. After making the said payments the creditors of Benedict, Melone & Co. first attached all the property of said Benedict, Melone & Co. in the hands of this defendant, Charles Stewart, up to March 17th, 1882, leave of court for the issuance and service of said attachments being given; and on March 17th, 1882, the attachments then issued and levied by leave by court covered all of the property of said firm in the hands of this defendant, Charles Stewart. These defendants charge that under the orders of the Jackson circuit court of Jackson county, Missouri, and not otherwise, defendant, Charles Stewart, has made payment to certain persons; and these defendants attach hereto a statement showing the names of the persons paid, their residence and citizenship, and the amount of each payment. The defendants admit that at the time of the execution of said deed of trust and the appointment of this defendant as receiver of said firm of Benedict, Melone & Co. the said firm were largely indebted to persons and firms and corporations other than the complainants, and that these debts are now long since
81 due, but these defendants deny that the names or amounts of their debts are unknown to the complainants. The said names of said creditors are well known to the complainants and their attorneys, and they are a large part of the citizens of this State, which fact was well known to these complainants and their attorneys when they removed this cause to this court. Said creditors are not numerous; some of them are not residents of this State. The names of said creditors and their citizenship are given in exhibits attached to this answer. The names of these creditors — the amounts of their debts were at all times known to the complainants and their attorneys long before the commencement of this suit in the State court and long before the removal thereof to this court. These defendants, further answering, say that on March 25th, 1882, long prior to the commencement of this suit in the Jackson circuit court, in Jackson

county, Missouri, and after attachments had been issued and garnishments served on the defendant Stewart for amounts larger than all the funds in his hands belonging to the said firm, the Farmers' and Traders' Bank of Bowling Green, Missouri, filed its petition in the office of the clerk of the Jackson circuit court, in Jackson county, Missouri, against the defendant, Charles Stewart, and summons was sued out and served on this defendant, and this defendant thereupon demurred to said petition, and thereupon afterwards, on the 23d day of September, 1882, said Farmers' & Traders' Bank filed its amended petition in said cause, a copy of which amended petition is attached to this answer and made a part hereof. The said defendants submit that the said suit is against the same defendants and for the same purpose as this suit, and that the said suit is brought on behalf of the said Farmers' & Traders' Bank of Bowling Green, Missouri, and on behalf of all other creditors of
82 said Benedict, Melone & Co.; said suit is still pending and still undetermined. The said Farmers' and Traders' Bank is a corporation organized under the laws of the State of Missouri, and is a citizen of the State of Missouri, and the complainants in this case and their attorneys well knew of the institution of said suit long before the suit was commenced, and they well knew that they could not commence and sustain the present suit while the said suit was pending and undetermined. These defendants submit that this suit ought not to be had or maintained, and that these defendants ought not to be harassed with the same while the said cause is still pending and undetermined in the Jackson circuit court, in Jackson county, Missouri. These defendants deny that it is impracticable to bring all of the creditors of Benedict, Melone & Co. before the court. The defendants submit that the claim of the complainants and all other creditors of said firm are under the said deed of trust claimed in said bill to be an assignment, and that the claims under said deed of trust are joint and not several, and the reason that other creditors are not joined is because said creditors are residents and citizens of this State, and therefore cannot join in this case, and not for the reason that they are unknown. These defendants submit that the complainants and their attorneys have made no efforts to ascertain the names of the creditors of Benedict, Melone & Co., their places of residence and citizenship, because the defendants aver that the names of the said creditors appear with their places of residence and the amounts of their debts in the said cause wherein Charles H. Benedict is plaintiff and Richard A. Melone and James B. Melone are defendants, to which said cause these defendants
83 submit that the complainants, by proving their debts and receiving their dividends, have made themselves parties. These defendants submit that the complainants are not entitled to the relief demanded or any relief.

These defendants submit to this honorable court that all and singular and every of the matters in the said complainants' bill of complaint mentioned and complained of are matters which may be tried and determined at law, and with respect to which said complainants are not entitled to any relief from a court of equity; and

these defendants hope they shall have the benefit of this defence as if they had demurred to said complainants' bill; and these defendants deny all unlawful combination in the said bill charged, without that any other matter or thing material for them to make answer to, and not herein sufficiently answered, avoided, or denied, is not true to the knowledge or belief of these defendants; all of which matters and things these defendants are ready to aver and prove as this honorable court may direct, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

CHARLES STEWART,
THE BANK OF KANSAS CITY,
THE BANK OF COMMERCE,
THE CITIZENS' NATIONAL BANK,
All of Kansas City, Mo., Defendants.

TICHENOR, WARNER & DEAN,
KARNES & ESS,
Solicitors.

84-123 UNITED STATES OF AMERICA, } ss:
Western Division of the Western District of Missouri, }

L. F. Wilson, vice-president of the Bank of Commerce, being duly sworn, does depose and say that I am vice-president of the Bank of Commerce named in the foregoing answer subscribed by said parties; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to these matters he verily believes them to be true.

L. F. WILSON.

Subscribed and sworn to before me on this 27th day of August, 1883.

[SEAL.] HENRY M. STONESTREET,
Notary Public, Jackson County, Mo.

The following exhibits were filed with said answer, to wit:

(Pp. 85 to 123, inclusive, omitted in printing, per stipulation. See p. 444.)

124 KANSAS CITY, MO., *January* 22, 1883.

To his honor, Judge T. A. Gill, Jackson circuit court, division No. 1, Kansas City, Mo.:

Pursuant to an order of Jackson circuit court, division No. 1, I respectfully report that due notice was given by publication in "Daily Times" and "Daily Journal" (two daily papers published in Kansas City, Mo.) to all creditors of the late firm of Benedict, Melone & Co. to present their claims to me, as receiver, at the office of Messrs. Karnes & Ess, in Kansas City, Mo., on the 6th day of January, 1883.

The affidavits of publication, marked "A" and "B," are filed herewith.

That I also sent notice by postal card to all creditors whose names appear on the books of said Benedict, Melone & Co., and also to all other parties of whose claims I had any notice whatever.

The paper marked "C," herewith attached, contains claims presented and approved, no objections having been made thereto.

The paper marked "D" contains claims which appear on books of Benedict, Melone & Co. and which I consider valid, but which were not presented for allowance.

The paper marked "E" contains claims which I considered doubtful and which were not passed on by me.

I would further respectfully state that in allowing claims interest was allowed at the rate of 6 per cent. per annum on all open accounts and acceptances from date of maturity to Jan'y 6th,
125 1883, and all notes — the rate of interest called for on the face of same.

Recapitulation.

Claims presented and approved	45,804 36
Interest on same	2,537 02
Claims not presented, but considered good	1,995 63
Interest on same	99 98
Claims in litigation or considered doubtful	33,093 12
Interest on same	2,798 54
Total amount of claims, with int., approved	50,436 99
Total amount of claims, with int., considered doubtful	35,891 66
Total amount of claims	86,328 65

Very respectfully,

CHAS. STEWART,
Receiver Benedict, Melone & Co.

Which said Exhibit "A" is in words and figures as follows, to wit:

Affidavit of Publication.

Chas. E. Hasbrook, of the city of Kansas, Mo., of lawful age, being duly sworn, says that he is one of the publishers of the Times, a newspaper published daily and weekly in the city of Kansas, Jackson county, Mo., and that the advertisement of order of publication — Charles H. Benedict *vs.* Richard A. Melone and James D. Melone, a true copy of which is hereto attached, was duly published in the daily edition of said newspaper for the period of three weeks, beginning December 16, 1882, and ending January 6, 1883, on the following dates: Dec. 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31; Jan. 1, 2, 3, 4, 5, 6, the same being pub-
126 lished in Nos. 169, 170, 171, 172, 173, 174, 175, 176, 177, 178 179, 180, 181, 182, 183, 184 of vol. 25, and Nos. 1, 2, 3, 4, 5, 6 of volume 26 of said newspaper.

CHAS. HASBROOK.

Subscribed to and sworn to before me this 13th day of January, 1883, and I certify that I was duly qualified as notary public, and my term expires ——.

HENRY FRENCH,
Notary Public, Jackson Co., Mo.

Ord. of Publication.

In the Jackson Circuit Court, in Jackson County, Mo., Sitting at Kansas City, Mo.

CHARLES H. BENEDICT, Plaintiff,
vs.
RICHARD A. MELONE and JAMES D. MELONE, Defendants.

In the matter of the receivership of the partnership effects and property of Benedict, Melone & Co., public notice is hereby given to all of the creditors of Benedict, Melone & Co. that under the decree of the Jackson circuit court, in division No. 1, I, the undersigned receiver, will, on Saturday, the 6th day of January, 1883, at the office of Karnes & Ess, in Kansas City, Mo., between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of that day, proceed to order and determine claims against the partnership effects and estate of said Benedict, Melone & Co., and all persons having claims against said estate shall appear at the said time and place to lay before the undersigned receiver the nature and amount of their respective claims.

CHARLES STEWART,
Receiver of Benedict, Melone & Co.

127 *Affidavit of Publication.*

James A. Mann, of the city of Kansas, Missouri, of lawful age, being duly sworn, says that he is sec't'y and a member of the Journal Company, proprietors and publishers of the Journal, a newspaper published daily, tri-weekly, and weekly in the city of Kansas, Jackson county, Mo., and that the notice to the creditors — Charles H. Benedict, plaintiff, *vs.* Richard A. Melone & James B. Melone, defendants, a true copy of which is hereto attached, was duly published in the daily edition of said newspaper for the period of twenty-two days, commencing on December 16, 1882, & in each & every day & issue thereafter to & including January 6, 1883.

JAMES A. MANN.

Subscribed and sworn to before me this 13th day of January, 1883, and I certify that I was duly qualified as a notary public. My term expires Nov. 28, 1885.

[SEAL.] LIONEL MAISE, *Notary Public.*

Printer's fee	$10 00
Proof of publication	50
Total	$10 50

1, 13, '83.

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128 *Notice to Creditors.*

In the Jackson Circuit Court, in Jackson County, Mo., Sitting at Kansas City, Mo.

CHARLES H. BENEDICT, Plaintiff,
vs.
RICHARD A. MELONE and JAMES B. MELONE, Defendants.

In the matter of the receivership of the partnership effects and property of Benedict, Melone & Co., public notice is hereby given to all the creditors of Benedict, Melone & Co. that, under the decree of the Jackson circuit court, in division No. one, I, the undersigned receiver, will, on Saturday, the 6th day of January, 1883, at the office of Karnes & Ess, in Kansas City, Missouri, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon of that day, proceed to order and determine claims against the partnership effects and estate of said Benedict, Melone & Co., and all persons having claims against said estate shall appear at the said time and place to lay before the undersigned receiver the nature and amounts of their respective claims.

CHARLES STEWART,
Receiver of Benedict, Melone & Co.

129 Afterwards, at the regular October term of said court and on the 15th day of October, A. D. 1883, the following entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come complainants, by their solicitors, and file reply to answer of defendants, Bank of Kansas City *et al.*

Said reply is in words and figures as follows:

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Chancery.

130 UNION NATIONAL BANK OF CHICAGO, Illinois; HENRY C. BANNARD and Bennett Lyman, Composing the Firm of Bannard, Lyman & Co.; Peter Lorillard, Charles Seedler, and Pierre Lorillard, Jr., Composing the Firm of P. Lorillard & Co.; The Boston Sugar Refining Company, a Corporation; Mark W. Mendell and Emanuel W. Mendell, Composing the Firm of M. W. Mendell & Bro.; John Arbuckle and William V. R. Smith, Composing the Firm of Arbuckle Bros.; The Continental Sugar Refining Company, a Corporation; The Standard Sugar Refining Co., a Corpoation, and The Leavenworth Sugar Refining Co., a Corporation, Complainants,

against

THE BANK OF KANSAS CITY, THE BANK OF COMMERCE, CITIZENS National Bank, Charles Stewart, James B. Melone, Richard A. Melone, and Charles H. Benedict, Respondents.

The reply of the said Union National Bank and the other complainants above named to the joint answer of the said respondents, Charles Stewart, Bank of Kansas City, Bank of Commerce, and The Citizens National Bank, to the amended bill of complaint herein.

Reserving all benefit and advantage to themselves of exception to the numerous errors and insufficiencies in the said joint answer contained, in reply thereto the said complainants say they admit that the instrument of writing copied into the body of said respondents' answer and therein called a "deed of trust" is the same instrument described in complainants' amended bill of complaint and filed with the original bill herein; but the complainants deny that the said instrument in writing has any validity as or is in law a deed of trust for the sole benefit of the creditors of Benedict, Melone & Co., who were therein named, but complainants say that said instrument operated in law as and is, in consequence of the
131 of the matters and things set forth in the amended bill of complaint, a voluntary deed of assignment for the benefit of all the creditors of the said Benedict, Melone & Co.

Further replying, complainants say they deny that the said respondents, on the 16th day of February or first day of April, 1882, had no knowledge or information of the insolvency of the said Benedict, Melone & Co., and on the contrary said complainants aver and charge that said respondents and each of them well knew, on the 16th day of February, 1882, and at all times since said date, that said Benedict, Melone & Co. were hopelessly insolvent, and especially did each and all of said respondents have such knowledge of said insolvency at the time said respondent, Stewart, paid said respondent banks in full; and complainants deny that the said respondents or any of them at any time thought or believed that there were sufficient assets of said Benedict, Melone & Co. to pay their creditors in full and leave fifteen thousand ($15,000.00) dollars or any other sum to be divided between the said parties.

Complainants, further replying, say that it was true the respondent, J. B. Melone, was connected with the "Farmers' and Traders' Bank" of Macon, Mo., but complainants say he was only connected therewith as a stockholder or partner and not as an active officer or manager; and complainants also admit that said J. B. Melone was connected with the "Macon Savings Bank," but complainants say he was president thereof and not the cashier, as stated in said answer. The complainants deny that the said J. B. Melone was in any manner connected with the Missouri Coal and Mining Co., as stated in said answer.

Further replying, complainants say they deny that the said respondents, Charles H. Benedict and Richard A. Melone, after
132 having consulted with their counsel, concluded, of their own motion, to make a deed of trust for the sole use of the respondent banks, as stated in said answer, and, on the contrary, complainants aver and charge that the said Benedict and the said Melone only concluded to attempt to do so because of the de-

mands and the importunities of the said respondent, Stewart, and of the officers, agents, and attorneys of the said respondent banks, and because of the refusal of the said Stewart to act as the assignee of said Benedict, Melone & Co. for the benefit of all their creditors, as requested and directed by said respondent, J. B. Melone, in the manner more fully stated in said amended bill.

Complainants, further replying, deny that the respondents, Charles H. Benedict and Richard A. Melone, had no authority from said J. B. Melone to make a deed of assignment for the benefit of all the creditors of said Benedict, Melone & Co., and, on the contrary, complainants assert that said J. B. Melone gave specific written directions to his partners, the said C. H. Benedict and R. A. Melone, to make such deed of assigment.

Complainants deny that said R. A. Melone had any authority whatever to make a deed of trust in the name of the said firm of Benedict, Melone & Co. for the sole benefit of the respondent banks.

Complainants deny that the respondent, Charles Stewart, now holds or ever held the funds sought to be reached by these proceedings, or any part thereof, under the orders of the circuit court of Jackson county, Missouri, and complainants deny that said fund or any part thereof is now or ever has been under the order of said Jackson county circuit court, and complainants deny that said respondent, Stewart, is now or ever has been in any manner
133 amenable to said Jackson county circuit court for what he may do or has done with or in regard to the property or funds sought to be reached in this proceeding.

Complainants deny that the debts mentioned in the written instrument, called a deed of trust in said answer, were preferred claims or debts in law, and they deny that the said Stewart had any right to pay the same in full or to any greater extent than was paid to other creditors.

Complainants deny that the indemnity demanded by the said Charles Stewart from the respondent banks, which was given by said banks to said Stewart at the time said Stewart paid said banks their respective claims in full, as stated in the answer, was either demanded or given because of the pendency of the attachment suits brought by John Plankington and others against Benedict, Melone & Co., mentioned in the answer, but, on the contrary, complainants aver that said indemnity was demanded and given for the reason stated in complainants' amended bill of complaint.

The complainants deny that the said payment made by the said Stewart to said banks was made with the purpose of saving interest on said debts, but the same was paid by the said Stewart to said banks unlawfully and in a wrongful attempt to prefer said banks to the other creditors of the said Benedict, Melone & Co., and complainants deny that at the time of said wrongful payment said Stewart expected to be able to pay all the creditors of the said Benedict, Melone & Co. in full within thirty days after such payment or at any other time, and, on the contrary, complainants say that the said Stewart very well knew at the time of such payment that said Benedict, Melone & Co. were hopelessly insolvent.

Complainants admit that the Farmers' and Traders' Bank
134 of Bowling Green, Mo., instituted an action of some kind in the circuit court of Jackson county, Mo., at or about the time stated in the answer, against the respondents herein, but as to whether said suit is still pending and as to whether the objects and purposes thereof are correctly stated in said answer, complainants say they do not know nor have they any knowledge or information thereof sufficient to form a belief.

Complainants, having fully replied to the answer of the said respondents or such portion thereof as they are advised is necessary for them to reply to, *they* pray judgment as in their amended bill of complaint.

DOBSON & DOUGLASS,
Of Counsel for Compl'ts.

Afterwards, at the regular October term, 1883, of said court, and on the 17th day of November, A. D. 1883, the following entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day comes the respondent, James B. Melone, by his solicitor, John F. Williams, and enters his appearance in this cause and files answer to the amended and substituted bill of complaint herein.

Said answer is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. Oct. Term, 1883.

UNION NATIONAL BANK OF CHICAGO, a Corporation; HENRY C. BANnard, and Bennett Lyman; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., Composing the Firm of P. Lorillard &
135 Co.; Boston Sugar Refining Company, a Corporation; Marx W. Mendel & Emanuel W. Mendel, Composing the Firm of M. W. Mendel & Brothers; John Arbuckle, Charles Arbuckle, and William V. R. Smith, Composing the Firm of Arbuckle Brothers; Continental Sugar Refining Company, a Corporation; Standard Sugar Refining Company, a Corporation, & Leavenworth Sugar Company, a Corporation, Complainants,

vs.

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation; Citizens' National Bank, a Corporation; Charles Stewart, and James B. Melone, Richard A. Melone, and Charles H. Benedict, Respondents.

Now, at this day, comes the said James B. Melone, one of said respondents, by his attorney, and makes voluntary appearance to said action, and for his separate answer to the amended and substituted bill of complaint filed herein states that it is true, as alleged by plaintiffs, that on or about the 15th day of February, 1882, he, for

the cause stated in said petition, sent a special messenger from his home in Macon city to his said copartners, R. A. Melone and C. H. Benedict, at Kansas City, with written instructions and directions to them to make a general assignment of all the partnership property of said firm of Benedict, Melone & Co. to the respondent, Charles Stewart, for the benefit of all their creditors, and that it is true, as alleged by complainants, that he was informed, and for a long time thereafter believed, that a general assignment had been made as directed by him; and it is true, as alleged by complainants, that the said deed of trust, made by his copartners, R. A. Melone & C. H. Benedict, attempting to prefer said defendant banks, was without his knowledge and consent and in violation of his express
136 written instructions and directions in the premises, and he never has and does not now acquiesce in or consent thereto, but, on the contrary, he dissents therefrom and repudiates the same.

This respondent, further answering the petition of the plaintiffs, says that as to all the other matters and allegations therein contained the same are true to the best of his knowledge, information, and belief. Whereupon this respondent joins in the prayer of the complainants that all the property of said firm of Benedict, Melone & Co. be appropriated to the payment of the debts thereof, *pro rata*, without any preference or priority whatever.

JAMES B. MELONE,
By his solicitor, JOHN F. WILLIAMS.

Afterwards, at the regular May term, 1884, of said court, and on the 5th day of June, A. D. 1884, the following entry appears of record in said cause, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come complainants, by their attorneys, and on motion it is ordered that complainants have leave to file amended bill herein, and said amended bill is thereupon filed.

Said bill is in words and figures as follows, to wit:

Bill of Complaint.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. May Term, 1883.
137 In Equity.

To the judges of the circuit court of the United States for the western division of the western district of Missouri:

Your orators herein, Union National Bank of Chicago, a corporation; Henry C. Bannard and Bennett Lyman, composing the firm of Bannard, Lyman and Company; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., composing the firm of P. Lorillard and Company; Boston Sugar Refining Company; Marx W. Mendel and Emanuel W. Mendel, composing the firm of M. W. Mendel and Brother; John Arbuckle and William V. R. Smith, composing the

firm of Arbuckle Brothers; Continental Sugar Refinery, a corporation; Standard Sugar Refinery, a corporation, and Leavenworth Sugar Company, a corporation, by leave of court bring this their amended substituted bill of complaint for themselves and all others, creditors of James B. Melone, Richard A. Melone, and Charles H. Benedict, composing the firm of Benedict, Melone and Company, who shall come in and seek relief by and contribute to the expense of this action against Bank of Kansas City, a corporation; Bank of Commerce, a corporation, and Citizens' National Bank, a corporation, Charles Stewart, and James B. Melone, Richard Melone, and Charles H. Benedict; and therefore—

Your orators allege that at the times hereinafter mentioned the said Union National Bank of Chicago was and still is a banking corporation duly organized under the laws of the United States in regard to national banks, with its chief office or place of business in the city of Chicago, State of Illinois, and the said Union National Bank is therefore a citizen of the State of Illinois; that the said Peter Lorillard, Charles Seedler, and Pierre Lorillard were at said times partners doing business under the firm name of P. Lorillard and Company
138 in the State of New Jersey, and are residents and citizens of the State of New Jersey; that the said Boston Sugar Refining Company was and still is a corporation doing business in and organized under the laws of the State of Massachusetts; that the said Marx W. Mendel and Emanuel W. Mendel were then and still are partners, doing business under the firm name of M. W. Mendel and Brother, in the State of New York, and are each residents and citizens of the State of New York; that the said Henry C. Bannard and Bennett Lyman were then and still are partners doing business under the firm name of Bannard, Lyman and Company in the State of Illinois, and that they are each residents and citizens of the State of Illinois; that the said John Arbuckle, Charles Arbuckle, and William V. R. Smith were then and still are partners doing business in the firm name of Arbuckle Brothers in the State of New York, and are each residents and citizens of the State of New York; that the said Continental Sugar Refinery was then and still is a corporation organized under the laws of and with its chief office or place of business in the State of Massachusetts, and therefore is a citizen of the State of Massachusetts; that the said Standard Sugar Refinery was then and still is a corporation organized under the laws of and with its chief office or place of business in the State of Massachusetts, and therefore is a citizen of the State of Massachusetts; that the said Leavenworth Sugar Company was then and still is a corporation duly organized under the laws of and with its chief office or place of business in the State of Kansas, and is therefore a citizen of the State of Kansas.

Your orators further say that the said Bank of Kansas City and the said Bank of Commerce were, at the dates hereinafter
139 mentioned, corporations duly organized under the laws of and with their chief offices or places of business in the State of Missouri, and are therefore citizens of the State of Missouri, the said Bank of Commerce having been known as and called by the

name of the Kansas City Savings Association prior to the — day of ——, 1882, at which time the name thereof was duly changed to Bank of Commerce; that the said James B. Melone, Richard A. Melone, and Charles H. Benedict were, *at* the sixteenth day of February, 1882, engaged in the wholesale grocery business at Kansas City, Missouri, as partners under the firm name of Benedict, Melone and Company, and the said J. B. and R. A. Melone and C. H. Benedict, as well as the said Charles Stewart, are each and all of them residents and citizens of the State of Missouri; that at the times hereinafter mentioned the said Citizens' National Bank of Kansas City was and still is a banking corporation duly organized under the laws of the United States in regard to national banks, with its chief office or place of business in the city of Kansas and State of Missouri, and the said Citizens' National Bank is therefore a citizen of the State of Missouri.

Your orators further say that on the 13th day of December, 1882, the said Union National Bank of Chicago recovered in the circuit court of Jackson county, State of Missouri, a judgment against the said Jas. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, for the sum of one thousand five hundred nine and $\frac{48}{100}$ dollars for its debt and also for costs; that on the said 13th day of December, 1882, the said Henry C. Bannard and —— Lyman, partners as aforesaid, recovered in said Jackson county circuit court a judgment against said J. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, for the sum of six hundred fifty-
140 two and $\frac{59}{100}$ dollars for their debt and also for their costs; that on the 13th day of December, 1882, the said Marx W. Mendel and Emanuel W. Mendel, partners as aforesaid, recovered in said Jackson county circuit court a judgment against said J. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, for the sum of nine hundred seventy-one and $\frac{66}{100}$ dollars for their debt and also for their costs; that on the 18th day of December, 1882, the said Boston Sugar Refining Company recovered in said Jackson county circuit court a judgment against said J. B. Melone and R. A. Melone and C. H. Benedict, partners as aforesaid, for the sum of two thousand fifty-three and $\frac{53}{100}$ dollars for its debt and also for its costs; that on the — day of ——, 1882, the said John Arbuckle, Charles Arbuckle, and Wm. V. R. Smith, in their firm name, recovered in said Jackson county circuit court against the said J. B. and R. A. Melone and C. H. Benedict, partners as aforesaid, a judgment for the sum of one thousand seven hundred sixty-six and $\frac{58}{100}$ dollars — and also for their costs; that on the — day of ——, 1882, the said Continental Sugar Refinery recovered in said Jackson county circuit court against the said J. B. and R. A. Melone and C. H. Benedict, partners as aforesaid, a judgment for the sum of one thousand one hundred sixty-seven and $\frac{99}{100}$ dollars — and also for its costs; that the said Standard Sugar Refinery recovered in said circuit court on the — day of ——, 1882, a judgment against the said J. B. and R. A. Melone, partners as aforesaid, for the sum of one thousand forty-two and $\frac{82}{100}$ dollars for its debt and also for its costs; that on the — day of ——, 1882, the said Leavenworth Sugar Company

recovered in said Jackson circuit court a judgment against said J. B. and R. A. Melone and C. H. Benedict, partners as aforesaid, for the sum of two thousand six hundred eighty and $\frac{44}{100}$ dollars and
141 also its costs; that the said J. B. Melone, R. A. Melone, and C. H. Benedict, partners as aforesaid, were then and still are indebted to the firm of P. Lorillard and Company in the sum of twelve hundred thirty-five and $\frac{81}{100}$ dollars for goods and merchandise sold and delivered by them to said firm of Benedict, Melone and Company.

Your orators further say that heretofore executions have been issued on all said judgments against said J. B. Melone, R. A. Melone, and C. H. Benedict, and have been duly returned *nulla bona*; that the said J. B. & R. A. Melone and C. H. Benedict, as partners as aforesaid, as well as each of them individually, were, on February 16th, 1862, and still are, hopelessly insolvent and wholly unable to meet their liabilities to your orators and their other creditors.

Your orators further state that after the contracting of said indebtedness, to wit, on the 16th day of February, 1882, the said Richard A. Melone, in the firm name of Benedict, Melone and Company, at Kansas City, Missouri, made, executed, and delivered a certain instrument in writing, by which were granted, bargained, sold, and delivered to said Charles Stewart all the goods, wares, and merchandise, of whatever description or character, of the said firm of Benedict, Melone & Company situate and being in their store-room, number 304 Delaware street, in said Kansas City, Missouri, and all their store fixtures, desks, scales, delivery wagons, horses, and harness, and also all notes, accounts, and bills receivable due or to become due to said firm of Benedict, Melone and Company, from any parties whatsoever, in trust, however, for the purpose of securing the said Bank of Kansas City and Kansas City Savings Association, now called "The Bank of Commerce," by which name it is here sued,
and the Citizens' National Bank, corporations as aforesaid, in
142 the payment of divers sums of money, amounting in the aggregate to about nineteen thousand dollars, which was then owing to said banks by the said Benedict, Melone and Company. In said written instrument it was intended to convey, and said instrument purports to convey, to said trustee, for the purposes aforesaid, all the property and assets of every kind and description belonging to the said firm of Benedict, Melone and Company, and, among other things, it was provided that said Charles Stewart should enter at once upon the discharge of the duties of his said trust, and take immediate possession of all the property conveyed thereby, and convert the same into money in any manner he might think proper, and pay the same, or as much thereof as might be necessary, to said Bank of Kansas City, Bank of Commerce, known by the name of the Kansas City Savings Association, and the Citizens' National Bank, in the discharge of their said debts within five days after they became due and payable, and any surplus remaining to be paid to the said Richard A. Melone, James A. Melone, and Charles H. Benedict, which said written instrument was duly acknowledged

by the said R. A. Melone, one of the grantors thereto, in the same manner as prescribed by law in cases wherein real estate is conveyed in this State, was duly filed for record and recorded in the office of the recorder of deeds of Jackson county, at Kansas City, on the said 16th day of February, 1882, a copy of which written instrument is filed with the original bill herein, the original not being in the possession or under the control of your orators.

Your orator further says that on the said 16th day of February, 1882, simultaneously with the making of said written instrument, the said Charles H. Benedict, one of the members of the firm
143 of Benedict, Melone and Company aforesaid, commenced his action in the circuit court of Jackson county, Missouri, against the said Richard A. Melone and James B. Melone, partners as aforesaid, alleging, among other things, that he, the said C. H. Benedict, plaintiff in the said action, had dissolved the partnership existing between the members of said firm of Benedict, Melone and Company; that the said J. B. Melone had become insolvent; that the said plaintiff, together with the said defendant in said action, had control of a large stock of goods, wares, and merchandises and debts due said firm, and that said firm was largely indebted to various persons from whom they had purchased goods, and praying the court for the appointment of a receiver for partnership property and for the ascertainment and payment of partnership debts; that upon the hearing of said petition on said day, before the Honorable Turner A. Gill, one of the judges of the circuit court of Jackson county, Missouri, at chambers, said Charles Stewart, trustee in said written instrument, was appointed receiver of the partnership property of the said firm of Benedict, Melone and Company and immediately qualified and entered upon his duties as such receiver, and thereupon said firm became dissolved and ceased to do business.

Your orators further say that at the time of making said written instrument and of instituting said action for the appointment of a receiver for partnership property, the said firm of Benedict, Melone and Company was and still is legally indebted to various other firms and persons besides those mentioned in said written instrument, and then was and still is insolvent and unable to pay all their creditors in full, and that said firm and said Stewart and said respondent banks herein had full knowledge of such insolvency.

Your orators further say that said J. B. Melone was a resi-
144 dent of Macon City, Missouri, and possessed of large means and greater financial credit than his copartners, C. H. Benedict and R. A. Melone, and had furnished the larger part of the capital theretofore used and then invested in the business of the said firm of Benedict, Melone and Company. Being largely interested in business pursuits other than the business of Benedict, Melone and Company, and out of which grave financial complications grew, he, the said J. B. Melone, seeing that it was impracticable for said firm to longer continue business, as they, the said firm, and each of them, were hopelessly insolvent, on the — day of February, 1882, and prior to the execution of said instrument and the appointment of said receiver, sent a special messenger from his home at Macon City to his

said copartners, R. A. Melone and C. H. Benedict, at Kansas City, with written directions to them to make a general assignment of all the partnership property of said firm of Benedict, Melone and Company to Charles Stewart for the benefit of all their creditors, of all which all the respondents herein had notice before the execution of the said written instrument and the appointment of said receiver; but disregarding such express direction and in direct violation of the same, and at the instance of said respondent, Charles Stewart, trustee in said written instrument, who urged and insisted that said respondent banks be preferred as creditors and first secured in their said debts, and who refused to act as requested by said J. B. Melone, unless said respondent banks were so preferred and secured, and that said R. A. Melone and C. H. Benedict, after they had consulted their counsel in regard to making a general assignment for the benefit of all the creditors of Benedict, Melone and Company and had employed counsel for that purpose, in consequence of the
145 requests and importunities of said Stewart, and said respondent banks executed and delivered said instrument in the firm name of Benedict, Melone and Company, thereby attempting to create such preferences in favor of said banks, and as part of a general purpose on their part of winding up their business and turning over all their property for the benefit of their creditors, and both before and after the execution of said instrument they intended and wanted to make a deed of assignment in the usual form, as provided by the laws of Missouri.

That the said James B. Melone was then ignorant of said attempted preference in favor of said banks, and did not for months afterwards know that a general assignment for the benefit of all creditors had not been made in the usual and ordinary way, as directed by him, but was led to beleive and did believe that his said directions had been followed; and your orators say that the said Jas. B. Melone never authorized the execution of said written instrument in the manner in which it is made, nor has he ever acquiesced in or ratified the act of his copartners in executing said instrument, attempting to create preferences in favor of said respondent banks.

And your orators further say that by reason of this want of authority from the said Jas. B. Melone to execute said instrument the same, in so far as it attempts by way of deed of trust or mortgage to create such preferences, is absolutely void as such, and the partnership property therein and thereby so attempted to be conveyed to said Stewart for said respondent banks inures to and for the benefit of all the creditors of the said firm of Benedict, Melone and Company, and which creditors have a lien and equitable charge upon all said property to the extent of their several debts.

146 Your orators further say that at the time of making said written instrument to the said Stewart, trustee as aforesaid, it was fully understood between all the respondents herein that the said firm of Benedict, Melone and Company was wholly insolvent and was to be immediately dissolved, and that the said Charles Steward, trustee in said written instrument, was to be appointed receiver of the partnership property of said firm, and that, notwith-

standing there was a defeasance clause inserted in said written instrument, such as is usually contained in deeds of trust in the nature of mortgages, it was, in fact, intended, by the aid of said proceedings, to settle the partnership and for the appointment of a receiver to absolutely and fully dispose of all said partnership property and to appropriate and dedicate the same to the payment of the debts of said Benedict, Melone and Company, so far as the same would go, after first paying said debts to said respondent banks in full.

Your orators further say that the simultaneous action of the said R. A. Melone and C. H. Benedict in making said written instrument in the manner hereinbefore stated and in dissolving said partnership and in having said trustee, Stewart, appointed receiver of the partnership property was a fraudulent attempt upon their part to evade the provisions of the statute in reference to voluntary assignments for the benefit of creditors, being chapter 5 of the Revised Statutes of Missouri.

Your orators further state that, by reason of all the premises and of the statute relating to voluntary assignments for the benefit of creditors, the written instrument aforesaid operated as and is in law and equity a voluntary deed of assignment on the part of said firm of Benedict, Melone and Company to said Stewart for the
147 benefit of all their creditors, and by virtue of the same the said firm assigned and conveyed to the said Stewart, as assignee, all their property and assets for the benefit of all their creditors in proportion to their respective claims; that all the property so assigned was then and there delivered to said Stewart in trust under said instrument, operating as an assignment in the manner aforesaid, who thereupon accepted the trust and immediately took possession and control of such property under said instrument; said property and assets were of large value, and out of which said Stewart has realized the sum of about fifty-eight thousand dollars ($58,000.00), enough to pay all the creditors of said Benedict, Melone and Company about sixty cents on the dollar of their demands, if the preferences so attempted to be made in said instrument be set aside and said instrument held and declared to be a voluntary assignment for the benefit of all to the creditors of said firm.

Your orators further say that under said instrument, operating as an assignment as aforesaid, it became and was the duty of said Stewart, as assignee, under the provisions of the statute aforesaid, within fifteen days after the execution of said instrument, to file in the office of the clerk of the circuit court of Jackson county a full and sworn inventory of the property assigned; to cause the same to be duly appraised; to file in said court, within three days after the filing of said instrument for record, a bond, with good and sufficient securities, in double the value of the assigned property, conditioned for the discharge in all things of his duties as such assignee and the faithful execution of the trust confided to him by said assignment, and to proceed to execute said trust by fixing
148 the time and place for and giving public notice of such time and place of adjusting and allowing demands against the said trust estate; to adjust and allow such demands; to pay all

such as may be allowed in proportion to the amounts thereof; to dispose of the property for that purpose, and from time to time to exhibit his accounts of said trust estate to the said court, and generally to faithfully perform said trust according to law.

Your orators further say that, notwithstanding his duty in the premises, said Stewart has wholly and entirely failed and refused to perform any of the duties so required of him under the said provisions of the statute regulating voluntary assignments for the benefit of creditors, and has at all times denied the right of the other creditors of said firm of Benedict, Melone and Company to share equally with the respondent banks in the distribution of said trust estate held by him as trustee in said instrument, but has proceeded to execute his said trust by virtue and under the powers attempted to be conferred upon him as aforesaid by said written instrument, treating the same as a valid mortgage by Benedict, Melone and Company securing and preferring said respondent banks to the full amounts of their debts against said firm.

Your orators further say that, with full knowledge of the rights of your orators and the other creditors of said firm of Benedict, Melone & Company to an equal distribution of said trust estate or the proceeds thereof among them in payment of their claim, the said trustee, Stewart, sold and disposed of all said trust property and effects so assigned to him, and received therefor, as aforesaid, the sum of about fifty-eight thousand dollars in money, and after paying the costs and expenses attending the matter has, by virtue of the
149 terms and provisions of said instrument attempting to create said preferences, paid said respondent banks the full amount due them, respectively, on their said claims, being the sum of about nineteen thousand dollars. But your orators say that, anticipating legal proceedings by the other creditors of said Benedict, Melone and Company who had been excluded from all participation in that part of said trust fund so devoted to the payment and satisfaction of the claims of the said respondent banks, the said Charles Stewart, trustee as aforesaid, demanded indemnity of said banks before paying them, and the said banks fully indemnified him against the demands of your orators and the other creditors of said Benedict, Melone and Company on account of his said action in paying said bank debts in full.

And, further, your orators say that said respondent banks received and said respondent, Stewart, paid the full amounts of their said demands with full knowledge of the rights of your orators and the other creditors of said Benedict, Melone and Company to share equally with them in the proceeds of said trust estate so paid said banks.

Your orators further say that said sum of money so retained and paid by said Stewart, as trustee in said written instrument, to said respondent banks, amounting as aforesaid to about the sum of nineteen thousand dollars, has not been accounted for by said Stewart, as receiver, to the said circuit court which appointed him receiver, but has been held and paid out by him as trustee in and by virtue of the powers attempted to be conferred by said written instrument

and without any order or direction entered of record of said circuit court authorizing him as such receiver to pay said sum or any part thereof to said respondent banks.

150 Your orators further say that said Stewart, as receiver, in pursuance of his appointment by and under the directions of said circuit court of Jackson county, Missouri, is proceeding to and has partially paid and distributed the remainder of said trust fund in his hands (after paying said banks in full, as trustee in said instrument as aforesaid) and arising from the sale of said partnership property to all other creditors of said Benedict, Melone and Company, including your orators, in proportion to their respective demands and in the same way that he would have been required to do had he qualified and acted as assignee according to law, and as to such action of said Stewart in the distribution of said surplus fund your orators here make no complaint and ask no relief.

Your orators further say that at the time of the execution of the said written instrument and the appointment of said Stewart as such receiver the said firm of Benedict, Melone and Company were largely indebted to persons and firms other than said respondent banks and your orators in large amounts unknown to your orators, which are long since due and unpaid; that said creditors are numerous, and many of them non-residents of this State, so that it is impracticable to bring them before this court in this action; wherefore your orators bring and file this bill of complaint for the benefit of all said creditors, as well as themselves, who may wish to join herein and contribute to the expenses of this action.

Wherefore your orators pray, in consideration of all the premises, that said written instrument from said Benedict, Melone and Company to said Stewart be adjudged and decreed by this court to be for the benefit of all the creditors of said Benedict, Melone and Company in proportion to their respective demands, and that

151 the said Stewart and said respondent banks be required to pay into the registry of this court the full amount so paid by said Stewart to said banks, to be distributed under the orders of this court to all the creditors of said Benedict, Melone and Company in proportion to their respective claims as equity and justice may require; or

That this court may, in consideration of all the premises, adjudge and declare that said written instrument to the said Stewart be a general assignment for the benefit of all the creditors of said firm of Benedict, Melone and Company in proportion to their respective claims, and that said Charles Stewart may be declared and decreed to be the assignee of said firm of Benedict, Melone and Company for the benefit of all their creditors; that he be required to give bond as such assignee, as in such cases provided by the statute of this State regulating voluntary assignments for the benefit of creditors; that he be required to fully account for all sums of money and property of said firm of Benedict, Melone and Company so paid the respondent banks by way of preference under and by virtue of said written instrument; that he be required to adjust and allow all legal claims and demands against said firm which were

owing at the time of making said written instrument; that he be required to distribute the said trust fund so paid said respondent banks as trustee aforesaid to the payment of the claims of all the creditors of said Benedict, Melone and Company in proportion to their respective amounts thereof, and for that purpose that the said respondents, The Bank of Kansas City, The Bank of Commerce, and The Citizens' National Bank be compelled to fully account for and pay over to the said Stewart as such assignee all sums of money and prop-
152 erty received by them from said Stewart under and in pursuance of the terms expressed in said written instrument as to the court may seem most equitable and just; and your orators further pray all such other and further relief as in equity and good conscience they may be entitled to have under the allegations of this bill, and for such orders and decrees, from time to time, as may be proper and necessary to fully protect their interests and also the interests and rights of all other creditors of Benedict, Melone and Company who may become parties to this bill; and your orators will ever pray.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to the said Charles Stewart, The Bank of Kansas City, The Bank of Commerce, The Citizens' National Bank, James B. Melone, Robert A. Melone, and Charles H. Benedict, thereby commanding them and each of them, at a certain time and under certain penalty therein to be named and limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further orders, directions, and decrees therein as to this honorable court shall seem meet.

DOBSON & DOUGLASS,
LATHROP & SMITH,
TOMLINSON & ROSS,
GAGE, LADD & SMALL,
STRONG & MIDDLEBROOK,
TRABER & GIBSON,
Solicitors for Complainants.

C. L. DOBSON, *Of Counsel.*

153 Afterwards, at the regular May term, A. D. 1884, of said court, and on the 7th day of June, A. D. 1884, the following entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come the parties, by their attorneys, and submit this cause to the court, with leave to complainants to file argument and brief by August first and to defendants to file abstract argument and brief by September first; complainants to file reply in fifteen days and to defendants, Webb M. Ruby, assignee, and others, to file intervening petition herein in fifteen days.

And afterwards, at said term of said court, and on June 16th, A. D. 1884, the following entry appears of record, to wit:

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come Webb M. Ruby, assignee of the Macon Savings Bank, *et al.*, by their attorneys, Messrs. Dobson & Douglass, and file intervening petition herein.

Said intervening petition is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. May Term, 1884.

UNION NATIONAL BANK OF CHICAGO *et al.*, Complainants,
against
BANK OF KANSAS CITY *et al.*, Respondents.

154 Intervening petition of Web M. Ruby, assignee of Macon Savings Bank; Samuel J. Wilson, assignee of Farmers' and Traders' Bank of Macon, Mo.; Boatman's Savings Bank of St. Louis; St. Louis National Bank, of St. Louis; Consolidated Tank Line Company; Liggett & Meyers Tobacco Company; Catlin Tobacco Company; Ridenour, Baker & Company; Samuel Cupples & Company; J. K. Armsby & Company; J. B. Indereiden & Brother; Reid Murdock & Fisher; Farmers' Bank of Bowling Green, Mo.

Now, at this day, come the said interveners, and by leave of court file this, their intervening petition in the above-entitled cause, and state that on Feb. 15th, 1882, and for many years prior thereto the Macon Savings Bank was and had been a banking corporation duly incorporated under the laws of the State of Missouri and doing business at Macon City, Mo., and, on said day, being insolvent and unable to longer transact business, made a voluntary assignment of all its property and effects to said intervener, Web M. Ruby, as assignee, under the provisions of chap. 5 of the Revised Statutes of Missouri, who thereupon duly qualified according to law and is now proceeding to execute his trust for the benefit of the creditors and depositors of said bank; and that on the — day of May, 1883, the said assignee recovered in the circuit court of Jackson county, Missouri, a judgment for $23,850.53 against the said respondents, Jas. B. and Richard A. Melone and Chas. H. Benedict, who had been for more than two years prior to Feb. 15th, 1882, partners doing a wholesale grocery business at Kansas City, Mo., under and by the firm name of Benedict, Melone and Company.

Said interveners further state that on Feb. 15th, 1882, and for years prior thereto the said respondent, Jas. B. Melone, and
155 one Chas. G. Sheppard and one John Epperson were and had been associated together as partners in a private banking concern, known as the Farmers' and Traders' Bank of Macon, Mo.,

which, on said Feb. 15th, 1882, being insolvent and wholly unable to longer continue its business, also made a deed of assignment to said intervener, Samuel J. Wilson, as assignee, of all their property and effects for the benefit of all their creditors and depositors, and the said Wilson, thereupon duly qualifying according to law, is now proceeding to execute his trust for the benefit of said creditors and depositors of said banking concern; and that on the — day of June, 1883, the said S. J. Wilson, assignee, recovered in the circuit court of Jackson county, Mo., a judgment for the sum of $5,994.44 against the said respondents, J. B. and R. A. Melone and C. H. Benedict, who had been partners as aforesaid in the grocery business at Kansas City, Mo.

Said interveners further state that said intervener, The Boatman's Savings Bank, is now and was for years prior to Feb. 16th, 1882, a banking corporation organized under the laws of Missouri and located at and doing business in the city of St. Louis, Mo., and as such corporation recovered in said Jackson circuit court, on the — day of ——, 1882, a judgment for the sum of $5,315.25 against the said respondents, J. B. & R. A. Melone and C. H. Benedict, who had been partners as aforesaid in business at said Kansas City.

Said interveners further state that the said intervener, St. Louis National Bank, is now and was for years prior to Feb. 16th, 1882, a banking corporation organized under the national banking act of the United States, with its place of business and chief office at St. Louis, Mo., and as such recovered in said Jackson circuit
156 court, on the — day of ——, 188–, judgments for the sum of $4,827.50 *and* against the said respondents, J. B. and R. A. Melone and C. H. Benedict, who had been partners as aforesaid in business at said Kansas City.

Said interveners further state that the said intervener, The Consolidated Tank Line Company, is now and was for years prior to said Feb. 16th, 1882, a corporation organized under the laws of the State of Ohio, and at that time doing business at said Kansas City and elsewhere, with its chief office at Cincinnati, and as such corporation recovered in said Jackson circuit court a judgment for $681.50, on Dec. 13th, 1882, and against the said respondents, J. B. & R. A. Melone and C. H. Benedict, who had been partners as aforesaid in business at said Kansas City.

Said interveners further state that the said intervener, The Liggett & Meyer Tobacco Company, is now and was for years prior to Feb. 16th, 1882, a corporation organized under the laws of Missouri and doing business in the city of St. Louis, Mo., and as such recovered in said Jackson circuit court a judgment for $338.58, on Dec. 11th, 1882, against the said respondents, J. B. & R. A. Melone and C. H. Benedict, who had been partners as aforesaid in business at said Kansas City.

Said interveners further state that said intervener, The Catlin Tobacco Company, is now and was for years prior to Feb. 16th, 1882, a corporation organized under the laws of Missouri, and doing business at St. Louis, Mo., and, as such corporation, on — day of January, 1882, sold and delivered to said respondents, J. B. & R. A. Me-

lone and C. H. Benedict, who had been for more than two years prior to said Feb. 16, 1882, engaged in the wholesale grocery business at said Kansas City as partners under and by the firm name of Benedict, Melone and Company, divers goods, wares, and
157 merchandise, for which they agreed to pay the said Catlin Tobacco Company the sum of $514.58, which they have wholly failed and refused to do.

Said interveners further state that said interveners, P. D. Ridenour, H. W. Baker, A. A. Baker, S. Ridenour, & E. P. Baker, were, on Feb. 16, 1882, and for years prior thereto, and are now, partners doing a wholesale grocery business at said Kansas City under and by the firm name and style of Ridenour, Baker & Company, and as such recovered in said Jackson circuit court a judgment for the sum of $1,184.00, on Dec. 23rd, 1882, against said respondents, J. B. & R. A. Melone and C. H. Benedict, who had for two years prior to said Feb. 16, 1882, been partners as aforesaid in business at Kansas City.

Said interveners further state that said interveners, Samuel Cupples, P. S. Bwoking, H. G. Bwoking, & A. W. Wallace, were, on Feb. 16, '82, for years prior thereto, and are now, partners doing business in St. Louis, Mo., under the firm name and style of Samuel Cupples & Co., and as such recovered in said Jackson circuit court a judgment for $713.10, on Dec. 13, 1882, and against said respondents, J. B. & R. A. Melone and C. H. Benedict, who had been partners as aforesaid in the wholesale grocery business at said Kansas City.

Said interveners further state that said interveners, J. K. Armsby and John M. Waite & Henry Newton, were, on Feb. 16, '82, for years prior thereto, and are now, partners doing business in Chicago, Illinois, under and by firm name and style of J. K. Armsby & Company, and as such recovered in said Jackson circuit court, on Dec. 9th, 1882, a judgment for $570.40, against said respondents, J. B. & R. A. Melone and C. H. Benedict, who had been partners as aforesaid in business at said Kansas City.

158 Said interveners further state that said interveners, J. B. Inderriden and —— Inderriden, were, on Feb. 16th, 1882, for years prior thereto, and are now, partners doing business at Chicago, Illinois, by the firm name and style of J. B. Inderriden & Brother, and as such sold and delivered, on — day of December, 1881, divers goods, wares, and merchandise to said respondents, J. B. & R. A. Melone and C. H. Benedict, who then were partners engaged in the wholesale grocery business at said Kansas City, Mo., under firm name and style of Benedict, Melone and Company, for which they agreed to pay the said J. B. Inderriden and Brother the sum of $364.46, which they have wholly failed to do.

Said interveners further state that said interveners, Reid, —— Murdock, and —— Fisher were, on Feb. 16th, 1882, for years prior thereto, and are now partners doing business at Chicago, Illinois, under and by the firm name and style of Reid, Murdock & Fisher, and as such sold and delivered, on the — day of January, 1882, divers goods, wares, and merchandise to said respondents, J. B. & R. A. Melone and C. H. Benedict, partners then engaged under the firm name of Benedict, Melone and Company, and for which the

latter agreed to pay said Reid, Murdock & Fisher the sum of $147.12, which they have wholly failed to do.

Said interveners further state the said intervener, The Farmers' Bank of Bowling Green, Mo., is and for a long time has been a corporation organized under the laws of Missouri, with its office or place of business at Bowling Green, Mo.; that the said Benedict, Melone & Co. are indebted to said bank in the sum of fifteen hundred dollars, with interest thereon, at the rate of six per cent. per annum, from the 19th day of March, 1882 (less the sum of $525.06 paid thereon on 1st day of Feb. 1883), on account of the bill of exchange herewith filed, for the sum of $1,500.00, dated Jan'y
159 19th, '82, and duly accepted of said Benedict, Melone and Company.

Said interveners further state that all their indebtedness against the firm of Benedict, Melone & Co. accrued prior to Feb. 16th, 1882, on which there has been paid 33⅓ per cent. (excepting the judgment in favor of said intervener, S. J. Wilson, assignee, from which an appeal has been taken to the supreme court of Missouri) by respondent, Charles Stewart, as receiver of said firm, and the balance thereof remains due and unpaid; that the said interveners, Web M. Ruby, assignee, S. J. Wilson, assignee, &c., St. Louis National Bank, Boatman's Savings' Bank, Liggett & Meyers Tobacco Company, Catlin Tobacco Co., Ridenour, Baker & Co., Sam'l Cupples & Co., Farmers' Bank of Bowling Green, and Consolidated Tank Line Co. are citizens of the State of Missouri, and said interveners, J. K. Armsby & Co., J. B. Inderriden & Bro., and Reid, Murdock & Fisher, are citizens of the State of Illinois.

Said interveners further state that on Feb. 16th, 1882, the said firm of Benedict, Melone & Co. became insolvent, and they and each member thereof are now hopelessly insolvent, and were dissolved, the Jackson county circuit court appointing as receiver thereof the said respondent, Chas. Stewart; that just prior to or about the time of such appointment one of said firm of Benedict, Melone & Co. executed in the firm name a deed of trust in the nature of a mortgage upon all their property and effects to said Stewart, in trust for said respondent banks, and the complainants to this action, who are also creditors of said firm of Benedict, Melone & Co., have brought the same to defeat the preferences attempted to be secured by said banks and to have the property therein and thereby so attempted to be conveyed said Stewart for such purposes, distributed ratably towards or in the payment of all the firm debts, and also to have said
160 instrument declared a deed of assignment for the benefit of all the firm creditors in proportion to their several claims.

Said interveners further state that said action is brought for the benefit of all other creditors of Benedict, Melone & Co. who shall seek the benefits thereof and contribute towards the payment of all costs and expenses incurred in the prosecution of the same, and these said interveners here and now aver a readiness and willingness on their part to so contribute to such costs and expenses, in consideration of their being permitted to share with said complain-

ants in the proceeds of whatever may be realized by means of said action.

Said interveners, having been advised of the contents of complainants' amended bill, herein join in all the allegations and prayer thereof, and pray this court to fully protect their rights and interests as creditors, and to make such orders as shall be proper and equitable.

PEAK & YEAGER,
LATHROP & SMITH,
TOMLINSON & ROSS,
DOBSON & DOUGLASS,
Att'ys for Interveners.

And afterwards, at the regular May term, 1885, of said court, and on the 21st day of May, A. D. 1885, the following entry appears of record in said cause, to wit:

UNION NAT. BANK *et al.*
against
BANK OF KANSAS CITY *et al.*

Ordered that the submission heretofore entered herein be set aside and for naught held, and that a rehearing and argument of this case be had.

161 And afterwards, at said term of said court, and on the 23rd day of May, A. D. 1885, the following entry appears of record, to wit:

UNION NATIONAL BANK CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come the parties, by their solicitors—the complainants, by Messrs. Dobson & Douglass, and the defendants, by H. N. Ess, Esq.—and this cause coming on for hearing the same is heard and the arguments of counsel are proceeded with, and not being completed at the hour of adjournment, it is ordered that further hearing be postponed until Monday morning.

And afterwards, at said term of said court and on the 25th day of May, A. D. 1885, the following entry appears of record, to wit:

UNION NATIONAL BANK CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

This day come the parties, by their solicitors, as on Saturday, and the arguments of counsel are proceeded with and completed; and now come the interveners, Webb M. Ruby, assignee of Macon Savings Bank; Samuel J. Wilson, assignee of Farmers' & Traders' Bank of Macon, Mo.; Boatman's Savings Bank, St. Louis National Bank, Consolidated Tank Line Co., Samuel Cupples & Co., Liggett & Meyers Tobacco Co., Ridenour, Baker & Co., J. K. Armsby & Co.,

J. B. Inderriden & Bro., Reid, Murdock & Fisher, and Farmers' Bank of Bowling Green, Mo., by their attorneys, and by leave of court withdraw their intervening petition filed herein on the 16th
162 day of June, 1884; and thereupon this cause is submitted to the court.

And afterwards, at said term of said court and on the 27th day of May, A. D. 1885, the following entry appears of record, to wit:

UNION NATIONAL BANK *et al.*
against
BANK OF KANSAS CITY *et al.*

This day again come the parties, by their solicitors, and this cause having heretofore been submitted to the court upon the pleadings and proof and taken under advisement, now, the premises being fully considered and the court being fully advised concerning the same doth order, adjudge, and decree that the complainants' bill be denied and dismissed and that the defendants go hence without day and recover of complainants their costs herein expended; thereupon the complainants except to the ruling of the court and pray the court to grant an appeal herein to the Supreme Court of the United States, and it is ordered that said appeal be granted on the filing by complainants of a bond in the sum of five hundred dollars to act as a supersedeas.

And as a part of this decree the following certificate of division of opinion was filed, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. May Term, 1885.

UNION NATIONAL BANK OF CHICAGO *et al.*
against
BANK OF KANSAS CITY *et al.*

TUESDAY, *May 27th, A. D.* 1885.

163 Upon the hearing of this cause on the pleadings and evidence with a view to a final decree, the following questions of law arose, on which the justice of the circuit court and the judge of the district court, sitting in the case, were opposed in opinion:

1. Is the instrument of writing in this case, called a deed of trust, which we find as a matter of fact conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart, as trustee, as surety for the banks therein named, void for want of the assent of James B. Melone, one of the partners, which was never given to that transfer?

Said deed of trust is as follows:

This deed, made and entered into this 16th day of February, A. D. 1882, by and between Benedict, Melone & Co., a firm doing business at Kansas City, Missouri, and composed of C. H. Benedict and R. A. Melone, of Jackson county, and J. B. Melone, of Macon county, all of the State of Missouri, parties of the first part, and Charles

Stewart, of Kansas City, Missouri, party of the second part, and The Bank of Kansas City, The Kansas City Savings Association, and The Citizens' National Bank, all being corporations duly organized, the first two under and by virtue of the laws of the State of Missouri and the said National Bank under and by virtue of the laws of the United States, all of said banks doing business at Kansas City, Missouri, parties of the third part, witnesseth: That the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created and of the sum of one dollar to them in hand paid by said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, convey, and deliver, and by these presents do grant, bargain, sell, convey, and deliver, unto
164 the said party of the second part the following-described personal property and choses in action, to wit, all goods, wares, and merchandise of whatsoever character or description (being such, however, as is generally kept in stock by wholesale grocery merchants), now situate and being in the store building No. 304 Delaware street, Kansas City, Missouri, which building is occupied by said firm of Benedict, Melone & Co.; also all store fixtures, desks, scales, delivery wagon, horsess and harness for the same, which is used in and about the business of Benedict, Melone & Co.; also all notes, accounts, and bills receivable due or to become due said firm from any parties whatsoever; to have and to hold the same unto said party of the second part and to his assigns and heirs forever, provided always and it is agreed and understood between the parties to these presents that if the said Benedict, Melone & Co. shall well and truly pay unto said Bank of Kansas City the sum of six thousand dollars ($6,000.00), with legal interest thereon, which said firm owes said bank, as evidenced by certain drafts drawn by said firm and cashed by said bank and now held by them, which said drafts are in words and figures as follows:

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, MO., *Nov. 22nd*, 1881.

Ninety days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to the account of—

BENEDICT, MELONE & CO.

To J. B. Melone & Co.

Which said draft was endorsed by Benedict Melone & Co.

Accepted; payable at Macon Savings Bank, Macon, Mo.

J. B. MELONE.

165 $2,000.00 KANSAS CITY, *January 13th*, 1882.

Sixty days after date pay to the order of ourselves two thousand dollars, value received, and charge same to the account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at the Macon Savings Bank, Macon, Mo.
J. B. MELONE.

$1,000.00. KANSAS CITY, *January 16th*, 1882.

Ninety days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to the account of—
BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.
J. B. MELONE.

$1,000.00. KANSAS CITY, *January 24th*, 1882.

Ninety days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to the account of—
BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.
C. G. EPPERSON.

$1,000.00. KANSAS CITY, *Feb. 8th*, 1882.

Ninety days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to the account of—
BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.
C. G. EPPERSON.

And provided also that if said firm shall well and truly pay to the Kansas Savings Association the sum of eleven thousand and
166 five hundred dollars ($11,500.00), with legal interest thereon, which they owe said association, as evidenced by certain drafts drawn by said firm and cashed by said association and owned by them, and by certain promissory notes executed to said firm to said association, which drafts and notes are described in words and figures as follows:

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Dec. 21st*, 1881.

Sixty days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to account of—
No. 8186.
BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.
J. B. MELONE.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware St.

$1,000.00. KANSAS CITY, Mo., *Dec. 7th*, 1881.

Ninety days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to the account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.

J. B. MELONE.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Dec. 7th*, 1881.

Seventy-five days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis,
167 value received, and charge to account of—

BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.

C. G. EPPERSON.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Dec. 21st*, 1881.

Seventy-five days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to account of—

BENEDICT, MELONE & CO.

To C. G. Epperson, Macon, Mo.

C. G. EPPERSON.

$1,000.00. KANSAS CITY, Mo., *Dec. 22nd*, 1881.

Ninety days after date we promise to pay to the order of C. J. White, cashier, one thousand dollars, at value received, with interest at — per cent. per annum.

BENEDICT, MELONE & CO.

$1,000.00. KANSAS CITY, Mo., *Jan'y 7th*, 1882.

Sixty days after date we promise to pay to the order of Kansas City Savings Association one thousand dollars, at value received, with interest at — per cent. per annum.

BENEDICT, MELONE & CO.

$1,000.00. KANSAS CITY, Mo., *Jan'y 7th*, 1882.

Ninety days after date we promise to pay to the order of Kansas City Savings Association one thousand dollars, at value received, with interest at — per cent. per annum.

BENEDICT, MELONE & CO.

168 $1,000.00. KANSAS CITY, Mo., *Jan'y 16th*, 1882.

Seventy-five days after date pay to the order of ourselves one thousand dollars, value received, and charge the same to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.

J. B. MELONE.

$1,000.00. KANSAS CITY, Mo., *Jan'y* 16, 1882.

Ninety days after date we promise to pay to the order of the Kansas City Savings Association one thousand dollars at Kansas City, Mo., value received, with interest at 10 per cent. per annum.

BENEDICT, MELONE & CO.

Office of Benedict, Melone & Co., wholesale grocers and jobbers of tobacco and cigars, No. 409 Delaware street.

$1,000.00. KANSAS CITY, Mo., *Jan'y 16th*, 1882.

Thirty days after date pay to the order of ourselves one thousand dollars, with exchange on New York or St. Louis, value received, and charge to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.

J. B. MELONE.

$500.00. KANSAS CITY, Mo., *Feb. 13th*, 1882.

At sight pay to the order of ourselves five hundred dollars.

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

$1,000.00. KANSAS CITY, Mo., *Feb.* 15, 1882.

At sight pay to the order of ourselves one thousand dollars.

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

And provided further that said firm shall well and truly pay unto the Citizens' National Bank of Kansas City the sum of
169 fifteen hundred dollars, with legal interest thereon, which said firm owes said national bank, as evidenced by certain drafts drawn by said firm and cashed by said national bank and now owned by them, which are described in words and figures as follows:

$750. KANSAS CITY, *Feb.* 7, 1882.

Sixty days after date pay to the order of ourselves seven hundred and fifty dollars, value received, and charge same to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.

J. B. MELONE.

$750.00. KANSAS CITY, Mo., *Feb.* 7, 1882.

Ninety days after date pay to the order of ourselves seven hundred and fifty dollars, value received, and charge the same to account of—

BENEDICT, MELONE & CO.

To J. B. Melone, Macon, Mo.

Accepted; payable at Macon Savings Bank, Macon, Mo.

J. B. MELONE.

(All of said above-mentioned drafts are endorsed by the firm of Benedict, Melone & Co.)—then these presents and everything herein shall cease and be void; but if they, the said Benedict, Melone & Co., shall fail or make default in the payment of such indebtedness to said three above-mentioned banks or any part thereof when the same shall have become past due and payable for five days, then it shall be lawful for said party of the second part to sell said property in any manner he shall think fit, and out of the proceeds arising from said sale pay off said indebtedness or so much thereof as shall be unpaid, together with the costs and expenses of said sale, and the overplus, if any there be, shall be paid to said parties of
170 the first part; said party of the second part shall take immediate possession of said property.

In testimony whereof the said Benedict, Melone & Co., by Richard A. Melone, one of the members of said firm, have hereunto set their hands and seals on this Feb'y 16th, 1882.

BENEDICT, MELONE & CO., [SEAL.]
By RICHARD A. MELONE.

STATE OF MISSOURI, } ss:
County of Jackson, }

Be it known that on this 16th day of February, 1882, before the undersigned, notary public within and for the county of Jackson and State of Missouri, personally came Richard A. Melone, who is personally known to me to be the same person who signed the name of Benedict, Melone & Co. to the foregoing deed as a party thereto and who is personally known to me to be a member of said firm, and the said Richard A. Melone acknowledged said deed and instrument to be the act and deed of Benedict, Melone & Co. for the uses and purposes therein stated.

My commission expires the 23rd day of August, 1884.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this 16th day of February, 1882.

[SEAL.] HENRY M. STONESTREET,
Notary Public, Jackson County, Mo.

Filed for record and duly recorded in my office on this 16th day of February, A. D. 1882.

C. D. LUCAS, *Recorder*,
By C. H. LUCAS, *D. R.*

2. As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of
171 creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under section 354 of the Revised Statutes of Missouri of 1879?

3. Does the making of that deed of trust and appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the proceeding to administer the assets of the insolvent partnership, to which the banks and Stewart and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors and require the receiver to administer the funds in his hands in that manner?

Whereupon it is ordered that the above certificate of division in opinion be filed and made a part of the record herein.

SAM. F. MILLER.
A. KREKEL.

172 Afterwards, to wit, on the 17th day of September, A. D. 1885, it being a rule day of said court, the following entry appears upon the order book of said court, to wit:

UNION NATIONAL BANK *et al. against* BANK OF KANSAS CITY *et al.*

This day there is filed in this cause a stipulation of parties waiving the issue and service of a citation, and also a stipulation as to the record.

Said stipulations are in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. In Equity.

UNION NATIONAL BANK OF CHICAGO, a Corporation; HENRY C. BANNARD & Bennett Lyman, Composing the Firm of Bannard, Lyman & Company; Peter Lorillard, Charles Seidler, & Pierre Lorillard, Jr., Composing the Firm of P. Lorillard & Company; Boston Sugar Refining Company; Marx W. Mendell & Emanuel W. Mendell, Composing the Firm of M. W. Mendell & Brother; John Arbuckle & William V. R. Smith, Composing the Firm of Arbuckle Brothers; Continental Sugar Refinery, a Corporation; Standard Sugar Refinery, a Corporation, and Leavenworth Sugar Company, a Corporation, Complainants,

against

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation, and Citizens' National Bank, a Corporation; Charles Stewart, James B. Melone, Charles H. Benedict, & Richard A. Melone, Respondents.

Now come the above-named respondents and appellees in the

above-entitled cause, by their attorneys, Karnes & Ess and
173 Warner & Dean, and waive the issuance of a citation in said cause admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington city, in the District of Columbia, on the 2nd Monday of October next, pursuant to an appeal prosecuted in said cause by the above-named complainants and appellants from the judgment rendered against them therein in this court.

KARNES & ESS,
WARNER & DEAN,
Attorneys for Respondents & Appellees.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. In Equity.

UNION NATIONAL BANK OF CHICAGO, a Corporation; HENRY C. BANNARD, and Bennett Lyman, Composing the Firm of Bannard, Lyman & Company; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., Composing the Firm of P. Lorillard & Company; Boston Sugar Refining Company; Marx W. Mendel and Emanuel W. Mendel, Composing the Firm of M. W. Mendel & Brothers; John Arbuckle and William V. R. Smith, Composing the Firm of Arbuckle Brothers; Continental Sugar Refinery, a Corporation; Standard Sugar Refinery, a Corporation, and Leavenworth Sugar Company, a Corporation, Complainants,

against

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation, and Citizens' National Bank, a Corporation; Charles Stewart, James B. Melone, Charles H. Benedict, and Richard A. Melone, Respondents.

It is hereby agreed and stipulated by and between Dobson & Douglass, of counsel for the complainants, and Karnes & Ess and Warner & Dean, of counsel for the respondents, that the clerk of this court may omit from the record, to be made up in the
174 above-entitled cause on appeal from this court to the Supreme Court of the United States, the following papers, to wit, the abstract of evidence filed by said complainants on May 31st, 1884, and likewise the abstract of evidence filed by respondents on June 3rd, 1884, in this court.

DOBSON & DOUGLASS,
Of Counsel for Complainants.

WARNER & DEAN,
KARNES & ESS,
Of Counsel for Respondents.

And afterwards, on the 9th day of September, A. D. 1885, in vacation of said court, the following entry appears of record, to wit:

UNION NATIONAL BANK *et al.*

against

BANK OF KANSAS CITY *et al.*

This day come complainants, by their solicitors, Messrs. Dobson & Douglass, and present to the court their bond for appeal in this cause, conditioned as heretofore ordered by the court, and said bond, being examined, is by the court approved and ordered to be filed and made a part of the record herein, which is accordingly done.

Said bond for appeal is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, Union National Bank of Chicago, a corporation; Henry C. Bannard & Bennett Lyman, composing firm of Bannard, Lyman & Co; Peter Lorillard,
175 Charles Seidler, & Pierre Lorillard, Jr., composing firm of P. Lorillard & Company; Boston Sugar Refining Company; Marx W. Mendel & Emanuel W. Mendel, composing firm of M. W. Mendel & Brother; John Arbuckle & Wm. V. R. Smith, composing firm of Arbuckle Brothers; Continental Sugar Refinery, a corporation; Standard Sugar Refinery, a corporation, and Leavenworth Sugar Company, a corporation, and Chas. L. Dobson, as principals, and Shannon C. Douglass and Felix L. La Force, of Kansas City, Missouri, as securities, are held and firmly bound unto Bank of Kansas City, a corporation; Bank of Commerce, a corporation, and Citizens' National Bank, a corporation, all located at Kansas City, Mo., and their successors and assigns, and also unto Charles Stewart, James B. Melone, Richard A. Melone, and Charles H. Benedict, their executors and administrators, in the sum of five hundred (500) dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fifth day of September, A. D. 1885.

Upon this express condition, to wit: Whereas the above-named Union National Bank of Chicago *et al.*, as complainants and appellants, against the above-named Bank of Kansas City *et al.*, as respondents and appellees, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above-named Union National Bank of Chicago *et al.* shall prosecute their said appeal to effect and answer all costs if they shall fail to

make good their plea, then this obligation to be void; otherwise to remain in full force and virtue.

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UNION NATIONAL BANK OF CHICAGO, [SEAL.]
By LATHROP & SMITH, *Its Att'ys & Agents.* [SEAL.]
BOSTON SUGAR REFINING CO., [SEAL.]
By HAGE, LADD & SMALL, *Attorneys & Agents.* [SEAL.]
CONTINENTAL SUGAR REFINERY, [SEAL.]
By W. J. STRONG, *Attorney & Agent.* [SEAL.]
STANDARD SUGAR REFINERY, [SEAL.]
By W. J. STRONG, *Attorney & Agent.* [SEAL.]
LEAVENWORTH SUGAR COMPANY, [SEAL.]
By W. J. STRONG, *Attorney & Agent.* [SEAL.]
ARBUCKLE BROTHERS, [SEAL.]
By W. J. STRONG, *Attorney & Agent.* [SEAL.]
P. LORILLARD & CO, [SEAL.]
By TOMLINSON, ROSS & DEW, *Att'ys & Agents.* [SEAL.]
BANNARD, LYMAN & CO., [SEAL.]
By LATHROP, *Their Att'y & Agent.* [SEAL.]
C. L. DOBSON. [SEAL.]
SHANNON C. DOUGLASS. [SEAL.]
FELIX L. LA FORCE. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

A. KREKEL, *Judge.*

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

Shannon C. Douglass, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, the
177 sum of five hundred dollars, and that he owns real estate to that amount, subject to execution, in the State of Missouri.

SHANNON C. DOUGLASS.

Subscribed and sworn to before me this fifth day of September, A. D. 1885.

[SEAL.] BEN. W. LIGHTBURN,
Notary Public for Jackson County, Missouri.

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

Felix L. La Force, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of five hundred dollars, and that he owns real estate to that amount subject to execution in the State of Missouri.

F. L. LA FORCE.

Subscribed and sworn to before me this fifth day of September, A. D. 1885.

[SEAL.] BEN. W. LIGHTBURN,
Notary Public for Jackson County, Missouri.

Upon the trial of said cause the following testimony was introduced, to wit:

178 EXHIBIT "I." Julius C. Hughes, Notary Public.

Notice to Take Depositions in U. S. Courts.

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

In the Circuit Court of the United States for the Western District of Missouri, Western Division.

UNION NATIONAL BANK OF CHICAGO *et al.*, Complainants,
against
THE BANK OF KANSAS CITY *et al.*, Respondents.

You, the above-named respondents, or Karnes & Ess and Tichenor, Warner & Dean, your attorneys of record, are hereby notified that on the 15th day of February, A. D. 1884, the above-named complainants will, in the above-entitled suit, at the law office of Dobson & Douglass, at southwest corner of 7th and Delaware streets, in the city of Kansas, in the county of Jackson, in the State of Missouri, take depositions of James B. Melone, Richard A. Melone, Chas. H. Benedict, Henry H. Craig, and Chas. Stewart, to be used as evidence on the trial of said suit, and on the hearing of each and every motion and application thereof. Said depositions will be taken because the testimony of said witnesses *is* necessary on the trial of said action, and that the taking of said depositions will be commenced at nine o'clock a. m. of said day, and that the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place until the taking of the same is completed.

Dated this 2nd day of February, A. D. 1884.

DOBSON & DOUGLASS,
Of Counsel for Complainants.

179 Service of the above notice is hereby accepted, and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived, this 2nd day of Feb'y, 1884.

WARNER & DEAN,
Attorneys of Record for Bank of Kansas City.

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

Be it remembered that on this 15th day of February, A. D. 1884, I, Julius C. Hughes, a notary public in and for the county of Jackson and State of Missouri, duly appointed, commissioned, and qual-

ified as such, did, under and by virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil causes in the courts of the United States, cause to come before me, at the law office of Dobson & Douglass, at the southwest corner of 7th & Delaware streets, in the city of Kansas, in the county of Jackson and State of Missouri, and between the hours of nine o'clock a. m. and six o'clock p. m. of said day, the following persons, to wit, Jas. B. Melone, Richard A. Melone, and Charles H. Benedict, to be examined as witnesses in a cause pending in the circuit court of the United States in and for the western division of the western district of Missouri, wherein the Union National Bank of Chicago *et al.* are complainants and the Bank of Kansas City *et al.* are respondents.

The said JAMES B. MELONE, of lawful age, being by me cautioned and sworn to testify the whole truth, and carefully examined
180 on the part of the complainant, deposeth and saith:

Direct examination by Mr. DOBSON:

Q. State your full name.
A. James B. Melone.
Q. Where do you reside?
A. At Jamesport, Missouri.
Q. Are you one of the respondents in this suit?
A. Yes, sir.
Q. Where did you reside in February, 1882?
A. At Macon City, Missouri.
Q. What business were you engaged in at that time?
A. In the banking business.
Q. With what bank were you connected?
A. The Macon Savings Bank.
Q. What position did you occupy in that bank?
A. I was president of it.
Q. What connection did you have with the firm of Benedict, Melone & Co., doing business at Kansas City?
A. I was a partner in the firm.
Q. Who were the other partners?
A. Mr. C. H. Benedict and R. A. Melone.
Q. Do you remember the time of their failure?
A. Yes, sir.
Q. Where were you at that time?
A. I was at Macon City.
Q. The bank of which you were president failed about the same time, did it not?
A. Yes, sir; it made an assignment the day before.
Q. The day before Benedict, Melone & Co failed?
A. Yes, sir.

Q. What, if any, communication with Benedict, Melone &
181 Co. or with the other members of the firm did you have in regard to what action they should take to wind up their business, just before they dissolved their partnership?

Objected to by respondents' counsel as incompetent and immaterial.

A. Well, the night after we made the assignment there I wrote a letter to Benedict, Melone & Co. and sent it to them by Mr. Saunders that night, detailing the fact of our assignment——

Objected to by respondents' counsel as incompetent.

Mr. DOBSON: We will prove the loss of the letter by other witnesses.

Q. Go on with your answer.

A. And stating that it would be necessary for them to make an assignment, and that they had better do so as early as possible the next morning, and I suggested Mr. Stewart as a proper person to act as assignee. That letter was sent up that night by Mr. Saunders. That is about all there is connected with it that I know anything about.

Q. How long after that was it until you learned what they had done with regard to making an assignment, or any similar action on their part?

A. I don't remember. Some days afterwards I received a letter from my brother stating that they had made an assignment and had preferred the banks here—made them preferred creditors. That is the only information I got with regard to it until months afterwards.

Objected to by respondents' counsel as immaterial and incompetent for the reason that the letter referred to is the best evidence.

Q. Where is that letter?

A. I don't know, sir.

Q. What did you do with it?

182 A. I never had it after I delivered it to Mr. Saunders to be delivered here.

Q. I mean the letter that your brother wrote you?

A. I never kept it. I had no idea that — would have any use for it and destroyed it, I suppose.

Q. You say in that letter he told you they had made an assignment and had preferred the banks here in Kansas City?

A. Yes, sir; that is my recollection of it.

Q. When did you learn, if at all, that a suit had been brought and a receiver appointed instead of making an assignment in the usual way?

A. I don't know; it was some months afterwards that I learned there had been a suit brought; I don't know how long.

Q. When did you first learn, if at all, the manner in which these banks had been preferred?

A. I never knew anything about the manner and I have never learned just the manner in which they were preferred.

Q. Do you know now the manner in which they were preferred?

A. Only just from hearsay.

Q. Have you ever examined the instrument that purports to secure them?

A. No, sir; I never have.

Q. I will ask you to examine this instrument, marked Exhibit "A"—which it is agreed between the counsel has been loaned us by the receiver, Mr. Stewart, for use here—and state whether you have ever seen it before.

A. I never have, to read it.

Q. State if you ever in any manner assented to the execution of that instrument, as a member of the firm of Benedict, Melone & Co. or otherwise.

Objected to by respondents' counsel as incompetent, irrelevant, and immaterial.

183 A. Well, I never assented to it. I never knew anything about it to assent. I never knew anything about it for a long time afterward.

Q. Have you ever at any time since then assented to it?

A. I have never said anything about it, either yea or nay.

Q. Who of the members of the firm of Benedict, Melone & Co. furnished the principal part of the capital to transact business with?

A. Well, we all had about the same amount in the concern—in the capital stock.

Q. But who furnished the principal part of the money to run the business with, and how was it furnished?

A. Our concern down there loaned them considerable money.

Q. What concern do you mean?

A. The Macon Savings Bank.

Q. Of which you were president?

A. Yes, sir.

Q. Your bank obtained judgment against Benedict, Melone & Co. for the amount that Benedict, Melone & Co. were owing your bank at the time of the failure?

A. I think so; yes, sir.

A copy of the pleadings and the judgment above referred to is hereto attached, marked "Exhibit B."

Q. Why did you write the letter to the other members of the firm of Benedict, Melone & Co. with regard to making the assignment of which you have just spoken?

Objected to by respondents' counsel as incompetent, irrelevant, and immaterial.

A. Because I thought it would be necessary to do so, and the sooner the better. I wanted to inform them as soon as possible, so that there would be no attachments run against them.

184 Q. Why did you think it was necessary that there should be an assignment?

A. Well, I thought so from the fact that I, being a partner with them, was interested in the Macon Savings Bank, and the bank having failed I thought that would have a tendency to destroy their

credit and perhaps be the means of attachments being run against them if they went on in business.

Cross-examination by Mr. Ess:

Q. Who composed the firm of Benedict, Melone & Co. at Kansas City?

A. Myself, Mr. Benedict, and my brother, R. A. Melone.

Q. When did your firm begin business here?

A. Well, it was about two years before they failed, I think.

Q. They were successors to whom?

A. Benedict, Krausse & Co.

Q. Who took Krausse's place in the firm?

A. My brother and myself took his place.

Q. Were you and your brother in the firm of Benedict, Krausse & Co.?

A. Only nominally so. I had no connection with it, only in a private way with Mr. Benedict.

Q. How were you connected with it through Mr. Benedict?

A. Well, he had agreed to give me a certain portion of his profits if I would assist him in making the arrangements and getting a start.

Q. What arrangements?

A. Monetary arrangements.

Q. Where was the money to come from, and with whom were the arrangements to be made?

A. I don't remember now where. He had a part of it, and
185 he had a part in the Macon Savings Bank.

Q. Was this arrangement between you and Benedict in writing, or was it verbal?

A. I do not remember whether we had a written contract or not. He had a lot of stock there at Macon City upon which we held a deed of trust, and we agreed to let him move it here, and we went in with these parties with the promise to apply a certain amount of the proceeds on that.

Q. You say "we" agreed to let him come here and bring the stock with him. To whom do you refer by "we?"

A. I mean our institution. Our bank had a loan on it, and had a lien in our deed of trust.

Q. The Macon Savings Bank?

A. Yes, sir.

Q. Then that stock of Benedict's was brought here to Kansas City?

A. Yes, sir.

Q. And he entered into the firm of Benedict, Krausse & Co., and you individually was to get half of the profits?

A. I was not to get it individually; it was to be applied on that indebtedness.

Q. Then how were you to be a partner?

A. Well, that is the only shape in which I was a partner at that time.

Q. You did not advance any capital in the business?

A. No, sir; I endorsed some for them.

Q. Did you ever live in Kansas City or look after the business of the firm here?

A. No, sir.

Q. The firm of Benedict, Melone & Co., then, began business in 1880 or 1879—which?

186 A. I reckon it was in 1880; early in the year.

Q. They were in business about two years?

A. Yes, sir.

Q. When you first entered into partnership did you have written articles, or was it merely verbal?

A. I think it was verbal?

Q. How long was the partnership to run—at the will of the parties, or did you have any definite length of time?

A. We had no definite length of time.

Q. What was to be the business here?

A. What do you mean?

Q. What was to be the business of Benedict, Melone & Co. at Kansas City?

A. Wholesale grocery business.

Q. Who were to assume the active control and management of the business at Kansas City?

A. Well, Mr. Benedict was the active man of the firm in buying, and my brother had the financial part, or the books and collections.

Q. So that Benedict and Melone were virtually to conduct the entire business here?

A. Yes, sir.

Q. From the time that business commenced up to the time it closed, in 1882, how many times were you in Kansas City to see after that business?

A. I was here three or four times.

Q. During the two years?

A. Yes, sir.

Q. Can you now tell me the date on which the Macon Savings Bank made its assignment?

187 A. I think it was the 15th day of February.

Q. 1882?

A. Yes, sir.

Q. Did it make any payment or keep open its doors during any part of the day of the 15th?

A. Yes, sir; all day. It made the assignment that night.

Q. What time was the assignment made?

A. It was made after supper, after candle light, commencing about 7 o'clock.

Q. What time in the day did you close the bank that day?

A. We closed, perhaps, about half after three o'clock.

Q. Is that the usual time for closing banks there?

A. It was a few minutes before the usual time.

Q. With what other bank were you connected in Macon City at that time?

A. I had an interest in the other bank—a small interest in the other bank as stockholder.

Q. What bank was that?

A. The Farmers' and Traders' Bank.

Q. Wasn't the Farmers' and Traders' Bank a copartnership?

A. Yes, sir; I believe it was.

Q. Who were the partners in it?

A. They were changed a time or two. When I had anything to do with it it was Mr. Towner, Mr. Krausse, Mr. Epperson, I think some one else, and myself, and Mr. Wagner, I believe.

Q. Who were the partners in the Farmers' and Traders' Bank at the time you made the assignment, February 15th, 1882?

A. Mr. Shepard, Mr. Epperson, and myself, I believe. I am not certain whether Mr. Towner had any interest in it then or not.

Q. Where did your board of directors in the Macon Sav-
188 ings Bank meet prior to the assignment and on the evening that the assignment was directed?

A. Well, in the bank building.

Q. What time was that meeting held?

A. I don't know whether it was after supper or not, but about candle light.

Q. The assignment was drawn up that night, then?

A. Yes, sir.

Q. Who drew the assignment for you?

A. Mr. Dysart.

Q. Mr. Dysart is present at this examination in the room here?

A. Yes, sir.

Q. Who drew the assignment for the Farmers' and Traders' Bank, the copartnership?

A. Mr. Guthrie, I think; Mr. Ben. Guthrie.

Q. Is he a partner of Mr. Dysart's?

A. No, sir.

Q. What notary did you have take the acknowledgement to these papers?

A. I don't know that I remember.

Q. What time did you finish the assignments—signing and acknowledging them?

A. Well, I suppose it was about 10 o'clock; maybe a little after ten.

Q. What did you do then?

A. I went home.

Q. How far did you live from the bank?

A. I suppose a quarter of a mile; in the suburbs of the town.

Q. What was done with the deed of assignment made by the corporation and by the partnership; who took it?

A. I think it was left with the parties we appointed as-
signees.

189 Q. Who were they?

A. Mr. Ruby was the assignee of the Macon Savings Bank; Web M. Ruby and S. J. Wilson of the other.

Q. Mr. Ruby and Mr. Wilson were both present and at the bank that night, were they?

A. Mr. Ruby was present at the Macon Savings Bank. I do not remember to have seen Mr. Wilson; he was at the other bank, I suppose.

Q. He was not at your bank. You had two separate meetings, then?

A. Yes, sir; they were two separate banks.

Q. What time did you get home that night?

A. Well, somewhere near ten to ten and a half o'clock.

Q. Where did you go next morning?

A. Next morning and next day I was around the bank all day pretty much.

Q. Was Mr. Ruby there?

A. Yes, sir.

Q. What was done that day, if anything?

A. Well, we had work to do. I was showing him through the correspondence and business generally there that had accumulated and needed attention, collections, &c., showing him where they properly belonged.

Q. What relation are you to Mr. Wilson?

A. None at all.

Q. What relation are you to Mr. Ruby?

A. None.

Q. How were you connected with him—in any way—by blood or marriage?

A. No, sir.

190 Q. Then on February 16th you were down at the bank and arranged about the inventory and assisted generally about collections, &c.?

A. I don't think we commenced the inventory until the morning of the 17th.

Q. Then you were assisting about——

A. Collections and papers that belonged to other parties.

Q. Were you kept busy during the day?

A. Pretty busy during the day—talking with a great many persons who wanted to see me.

Q. There was considerable excitement about that time, wasn't there?

A. Well, about as much as there is usually on occasions of that kind.

Q. What time did you open the bank on the 16th; I mean what time did you and the assignee go into the bank building?

A. I do not remember. We went down the next morning about the usual time of going to the bank; something later than 8 or 9 o'clock.

Q. And remained there during the day?

A. Yes, sir; at least I did. I don't remember whether he was there all day or not.

Q. Now, that was during the 16th?

A. Yes, sir.

Q. Did you telegraph to Kansas City that day?

A. I did not have any communication with Kansas City except in the way I have stated in my deposition. I did not telegraph.

Q. When did you write?

A. I wrote on the night of the 15th.

Q. Who was present when you wrote—do you remember?

A. Well, I wrote from my house. There was Mr. Epper-
191 son and Mr. Saunders is all that I remember that was present. They were coming up here that night.

Q. What time did the train pass Macon City coming to Kansas City at that time?

A. About one o'clock.

Q. They were coming up on that train?

A. Yes, sir.

Q. And it was then that you wrote the letter of which you have spoken?

A. Yes, sir.

Q. To whom was that letter written—R. A. Melone or C. H. Benedict?

A. I think it was addressed to Benedict, Melone & Co.

Q. Did you keep any copy of it?

A. No.

Q. Have you ever seen the letter since?

A. No.

Q. Have you ever made any inquiries for it?

A. I don't think I have until to-day; I asked my brother if he had it.

Q. And that letter was written up at your house and given to this gentleman to carry away?

A. Yes, sir.

Q. Now, can you tell us what you said in that letter?

A. I cannot quote the language; no, sir.

Q. Can you give us the substance of it?

A. I can give it to you as I recollect it now. I told him of the failure of the Macon Savings Bank, and also stated that it would be necessary for them to make an assignment, I presumed, and that they had better do it early the next morning, and suggested Charley Stewart as a proper person for assignee, he being acquainted
192 with the affairs; and I may have added or requested for them to make the Macon Savings Bank a preferred creditor if they could. I don't remember distinctly about that.

Q. Your idea was that as the bank had failed there the firm of Benedict, Melone & Co. would have to close up here?

A. Yes, sir; I supposed they would.

Q. Why?

A. Because they were owing a good deal there.

Q. But you wrote them they had better make an assignment?

A. Yes, sir.

Q. Why didn't you write out the assignment, have it executed and acknowledged there, and send it to the firm here?

A. That was out of my line of business, and I had something else to think about at that time.

Q. You say you think you requested them to make the Macon Savings Bank a preferred creditor?

A. It seems to me like I made that request. I am not sure about it; I think I did, though.

Q. Do you know how the firm stood here at that time?

A. Only from a statement I had had from my brother along about the first of January.

Q. Well, what was that; that they were solvent, in good condition, and doing well?

A. Well, I thought they were, sir, from their statement.

Q. You had no idea of quitting business here then?

A. No, sir.

Q. No idea but that all the debts of the firm would be paid?

A. No, sir.

Q. That statement informed you what the debts were?

A. I think it just gave a condensed statement as to what the liabilities were as per our books.

193 Q. What was the balance shown after all the liabilities were discharged; do you remember?

A. I do not remember; I remember about what it showed we had made that year—that is, for the year preceding—which was about $9,000; that, according to the statement, was the net profits.

Q. That was up to January 1st, 1882?

A. Yes, sir.

Q. How much capital did you put into this concern of Benedict, Melone & Co.?

A. Myself?

Q. Yes.

A. $2,500.

Q. Didn't you put in $25,000 *in?*

A. No, sir.

Q. How much did Mr. Benedict put in?

A. I don't know how much he had in at the time.

Q. How much had R. A. Melone put in?

A. Well, about the same amount that I had.

Q. What part of the profits were you to get?

A. One-fourth is my recollection.

Q. Was there a written contract or a verbal one between you? I believe you said it was a verbal.

A. I think it was verbal.

Q. Have you at this time any very distinct recollection as to the contents of the letter you wrote to the firm on the night of the 15th of February, 1882?

A. Nothing more than I have stated.

Q. Have you any letters written you by R. A. Melone or C. H. Benedict after the 15th of February, 1882?

A. Nothing in regard to business connected with the firm.

194 I think I have got one or two letters maybe from my brother in the last year that I may have at home, but they do not pertain to the business of the firm.

Q. Well, after you wrote the letter on the night of the 15th of February, 1882, did you receive any letters from Benedict or Melone?

A. I received a letter from my brother, as I stated here, a few days after that, stating that they had made an assignment and that they had made the banks here preferred creditors. That is the only letter I remember of having received from them for months after that.

Q. How long was that after you wrote the letter on the night of the 15th of February, 1882?

A. Well, my recollection is it was five or six days.

Q. What did you do after you had been informed that the banks of Kansas City had been preferred?

A. I didn't do anything; I said nothing further about it.

Q. You made no reply to that letter to Mr. Melone, did you?

A. I think not, sir.

Q. Mr. Melone, then, your brother, informed you in that letter that the banks here had been preferred by the assignment?

A. That was my understanding of it; yes, sir.

Q. Well, was that in the letter?

A. That is my recollection of it; yes, sir.

Q. Where is that letter?

A. I do not know, sir.

Q. Have you ever looked for it?

A. I have not looked for the letter recently; no, sir.

Q. Did you ever look for it?

A. I don't know that I ever did, sir.

Q. What was done with it?

195 A. I suppose it was destroyed. I never kept those letters. They were burned up or destroyed or left in the office there; I do not know which.

Q. It may be about your house, as far as you know; you have not looked for it?

A. No; I think not. I didn't bring any of those letters away with me. It may have been left in the office with other letters or burned up or destroyed. I don't know. I don't think I brought any of them away with me.

By Mr. DEAN:

Q. When did you next see your brother after the assignment was made of your bank at Macon city?

A. I don't think I saw him again until I came up here to court last fall. I think that is the first time I saw him.

Q. That was in the proceeding had by the Macon Savings Bank to collect a certain indebtedness from the receiver, Mr. Stewart?

A. Yes, sir; that is when I saw him. He was examined as a witness in that case.

Q. You appeared in the proceedings to have the claim of the Macon Savings Bank allowed against the receiver as one of the debts of Benedict, Melone & Co.?

A. Yes, sir.

Q. You were desirous as an officer and director of that bank to have these claims allowed?

A. Certainly.

Q. And you did all you could to have them allowed in that proceeding, did you not?

A. I did nothing more than give my testimony.

Q. But you were anxious to have it done?

A. Of course, I would like to have them collected.

Q. You were a defendant in the suit in which these proceedings were had?

196 A. Yes, sir.

Q. And you are a stockholder to a considerable amount and also a director in the Macon Savings Bank?

A. I was, yes, sir; at the time of the failure.

Q. You are under indictment, I believe, under the statute of Missouri, for assenting to the reception of deposits, or the creation of debts, at the time your bank was insolvent or in a failing condition?

A. I was at that time, but the indictments have been tried and dismissed—the cases have been dismissed.

Q. The cases against you have been dismissed?

A. Yes, sir; there are one or two of a similar character that have not been tried.

Q. So you are out on bail, the cases not having been disposed of. Now, you are, of course, interested in having it appear that the bank was not insolvent or in failing circumstances at the time these deposits were received or the liabilities created?

A. Of course, I am interested in that, but I don't see why.

Q. Now, what papers did you take at Macon city—what newspapers—Kansas City papers?

A. I never took any Kansas City papers there. We took the St. Louis papers.

Q. As a banker, you received the commercial reports, the transactions of business firms throughout the country?

A. Why, only what I could get in the papers.

Q. Do you recollect seeing the announcement made in the papers of the failure of Benedict, Melone & Co., of Kansas City?

A. I think I saw that in a St. Louis paper.

Q. That set out at the time what had been done, did it not, that they had failed and a receiver had been appointed?

197 A. I suppose so; I do not remember to have read it carefully. I thought I knew what had been done and I did not give that much attention.

Q. You knew that Mr. Stewart had been appointed receiver?

A. Yes, sir.

Q. By the court here, previous to that time?

A. I knew that he had been appointed in some capacity to wind up the affairs of the firm from the letter I got from my brother.

Q. Either as assignee or receiver?

A. Yes, sir.

Q. Now, you never heard of a preference in an assignment, did you, in all your life?

A. I don't know whether I did or not. I supposed it could be done.

Q. You had been informed by your brother that there had been a preference given by the firm to the banks here at Kansas City?

A. Yes, sir; I understood that.

Q. And that Mr. Stewart was either receiver or assignee?

A. Yes, sir; that is about my understanding of it.

Q. But you did not inquire into the nature or the manner in which the preference had been given at that time, or at any time subsequent?

A. No, sir.

Q. You did not even answer their letter?

A. I do not remember to have done so.

Q. Of course, then, you made no objections?

A. None at the time.

Q. You have never made any objections in court to the appointment of Mr. Stewart as receiver?

A. No, sir.

198 Q. Nor have you ever made any claim, or pretense of claim, that your appearance in court, which was entered there, was unauthorized?

A. I don't know what appearance you have reference to.

Q. I have reference to the proceeding in which Mr. Stewart was appointed receiver.

A. No, sir.

Q. On the contrary, on behalf of your bank, you did what you could to have the claim of your bank allowed in this proceeding, in which Mr. Stewart is receiver?

A. Well, I done nothing more than come up and testify in the case; and I testified to just what I thought to be true.

Q. Who is the attorney of Mr. Ruby, the assignee?

A. Mr. Dysart.

Q. He is also your personal attorney?

A. Yes, sir.

Q. He appeared on behalf of Mr. Ruby in these proceedings against the receiver to have the claim of your bank allowed on certain paper which the firm of Benedict, Melone & Co. insisted was simply accommodation paper?

A. Yes, sir.

Q. He was at the same time your personal attorney?

A. Yes, sir; he has been my personal attorney for many years.

Q. A. confidential adviser in your matters of business?

A. I do not know that he is any special adviser in the present matter.

Q. I mean in your law business?

A. Yes, sir.

Q. Are you and your brother on friendly terms?

A. Yes, sir.

Q. The ordinary amount of brotherly affection subsists among you?

199 A. Yes, sir; as far as I know.

Q. He would not undertake to deceive you in any transaction he had here?

A. No, sir; not intentionally, I think.

Q. He would tell you the truth about the matter?

A. I think so.

Q. Now, when he wrote you that letter you assumed that he told you the truth about the condition of things here as he understood them at the time?

A. Yes, sir.

Q. He did not misrepresent the state of affairs here or the transaction had by him and Mr. Benedict, representing the firm here?

A. No, sir; I think not.

Q. You knew of no reason then nor do you now why he should misinform you as to what had been done here?

A. No, sir.

Q. Have you ever called upon him for any information as to why he misinformed you, if he has misinformed you, as to what has been done here?

A. I don't know that I have ever had any conversation with him with regard to this matter especially.

Q. When he comes to Macon City he visits you, does he not?

A. He has never been there since that occurred?

Q. Well, you have been here?

A. Yes, sir.

Q. You visit him at his home?

A. Yes, sir.

Q. In the ordinary affairs of life you would be willing to trust his judgment, and assent to it in any thing he did in your

200 behalf?

A. Yes, sir.

Q. And he with you?

A. I think so.

Re-examination by Mr. DYSART:

Q. You stated that the criminal cases against you had been dismissed; were they all disposed of that way?

A. There was one case tried and I was acquitted, and the balance were dismissed.

Q. What was the capital stock of the Farmers' and Traders' Bank at Macon City?

Objected to by respondent's counsel as incompetent, irrelevant, and immaterial.

A. It was five thousand dollars.

Q. How much had you of it?

A. Well, one-fifth, I think.

Q. What was the capital of Benedict, Melone & Co.?

A. At the time of the assignment?

Q. During the partnership. I am speaking now of the capital stock.

A. Ten thousand dollars, I think.

Q. Where did the firm get the money to run its business, principally?

A. They didn't need any for some time till they had built up a business beyond their means, and they got some here, I think, and they got some at Macon City.

Q. What was your credit at and prior to the time of the assignment by the Macon Savings Bank—I mean as an individual?

A. Well, I think I had a good credit; I don't know to what extent; I never had any trouble in getting any money I wished to get.

201 Q. You may state the property your partners had prior to the time of the failure. Were they men of large or small property—Benedict and R. A. Melone?

A. Well, they had property; my brother had some property—not very much. I suppose they were worth four or five thousand dollars apiece. Mr. Benedict's consisted of what he had in the firm.

Q. Up to and prior to the failure of the Macon Savings Bank about how much property—real estate and personal property—did you own?

A. Up to that time and during the year preceding the failure I owned about $30,000 of personal property and real estate—twenty-eight to thirty thousand dollars. Then I had an interest with my brother-in-law in quite an amount of real estate—I don't know what the value of that would be—and notes and accounts aggregating, perhaps in gross assets, ninety to a hundred thousand dollars; but a portion of that was not very valuable. Part of the notes were good and part bad.

Q. You stated that Mr. Dysart was your personal attorney. In what cases do you mean—civil or criminal cases?

A. Well, I never had any personal suits before that time—I mean your relation to me since that time in my criminal cases. I don't remember to have had any personal suits prior to that time, either civil or criminal.

Q. You do not mean to say, then, that Mr. Dysart was your attorney in the suit to settle the partnership business of Benedict, Melone & Co.—that is, in the suit of Benedict against Melone and Melone?

Objected to as leading.

A. O, no; I do not mean to convey that idea. I had nothing to do with the employment of the attorney in that matter.

202 Q. You may state whether you made appearance to that suit or whether you were served with summons to settle the partnership—I mean Benedict against you and your brother?

A. I appeared by summons.

Q. State, in that connection, if you were represented by counsel in that case?

A. No, sir; I was not.

Q. State about the time you were served with summons, if you remember?

A. I do not remember the time.

Q. About how long after the assignment was it?

A. I could not tell you, sir; I do not remember.

Q. Can you tell whether it was a day or two or some months or a year?

A. Well, it appears to me like it was some months afterwards. I am not positive about that, though.

Q. What did you have to do, if anything, with the assignment of the Farmers' & Traders' Bank?

A. I did nothing except to sign the papers as a partner. They were presented to me to sign. I believe some of them did talk with me about whom they should appoint assignee.

Q. State if you had anything to do with the management of the Farmers' & Traders' Bank?

A. Nothing at all.

Q. After the assignments were made what further had you to do with the business of the Macon Savings Bank and the business of Benedict, Melone & Co., if any?

A. I had nothing at all to do with them.

Q. If you took any action in the way of employing counsel state it.

A. None at all. I had nothing to do with anything of the kind.

203 Recross-examination by Mr. DEAN:

Q. Who was the attorney of your bank?

A. Prior to the failure?

Q. Yes.

A. Mr. Guthrie had been.

Q. Who was the attorney at the time of the failure?

A. We had no attorney at that time. We did not employ an attorney by the year.

Q. Who prepared the papers in the assignment?

A. Mr. Dysart.

Q. Mr. Guthrie prepared the papers for the other bank?

A. Yes, sir.

Q. What were the liabilities of the Farmers' & Traders' Bank?

A. About $40,000.

Q. What were the liabilities of your bank?

A. I don't know; about $275,000, stock and all.

Q. What was the amount claimed on the paper held by the Macon Savings Bank against the firm of Benedict, Melone & Co.?

A. About twenty-two or three thousand dollars, I think.

Q. Your private property is attached with the assets of the bank?

A. No, sir; I turned it all over to the bank.

Q. Before it was attached or afterward?

A. There was nothing attached.

Q. How much were you owing to the bank according to the books?

A. About $9,000.

Q. How much money had you ever drawn out of the concern up here?

A. Nothing.

Q. You put in $2,500?

A. Yes, sir.

204 Q. Mr. Benedict put in $2,500?

A. I think he put in more than that.

Q. And your brother put in $2,500?

A. Yes, sir.

Q. When they made these loans from these banks here were you informed as to what banks the money was borrowed from?

A. I generally knew about what their indebtedness was here and the banks.

Q. In your letter you wanted a preference for your bank?

A. I think I made that request in my letter.

Q. You wanted some kind of a preference made to your bank and then an assignment, or something of the kind, for the benefit of the other creditors?

A. I wanted the Macon Savings Bank preferred if it could be done legally.

Q. After they were paid you wanted the funds to go to the general creditors in some shape that would be legal?

A. Yes, sir.

Q. That was about the substance of your request to them?

A. Yes, sir; I think it is.

Q. You left it, of course, to your or their attorneys here to fix it in such a shape as they thought proper?

A. Well, the matter of fact is, I stated for them to make an assignment for the benefit of our creditors, making the Macon Savings Bank a preferred creditor, if they could do so.

Q. Did anybody tell you that could be done?

A. I never conversed with anybody in regard to it.

Q. Yet you had Mr. Dysart with you that evening making up the assignment of the bank?

A. Yes, sir.

205 Q. And a very competent lawyer, too.

A. I never talked with him about that.

Signature waived.

Sworn to before me on the day, at the place, and within the hours first aforesaid, but by consent of counsel for complainants and respondents the signature of the said witness was waived.

JULIUS C. HUGHES,
Notary Public.

R. A. MELONE, of lawful age, being by me cautioned and sworn to testify the whole truth, and carefully examined on the part of the complainants, deposeth and saith:

Direct examination by Mr. DOBSON:

Q. State your name, age, and present residence.

A. My name is Richard A. Melone; my family live at Liberty, Missouri, and I am living at Oswego, Kansas, at present.

Q. What business are you engaged in?

A. Clerking.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. Were you a member of the firm of Benedict, Melone & Co.?

A. I was.

Q. What was your interest in the concern? What was the amount of your capital stock?

A. I put in $2,500.

Q. What part of the business did you have in charge?

A. I kept the books after January 1st, 1880.

Q. Do you remember the occurrence of the failure of the Macon Savings Bank and receiving a communication of some kind
206 from your brother about February 16th, 1882?

A. Yes, sir; I received a letter from him, I think, on that day.

Q. State what became of that letter.

A. Well, I don't know what became of it. Mr. Saunders gave me the letter.

Q. At what place and at what hour?

A. On the steps at Messrs. Karnes & Ess' office—at the bottom of the steps—as I came down town on the morning of the 16th of February, I suppose, at about 8 o'clock.

Q. What became of the letter then?

A. I broke the letter open and read it. It was a statement of the failure of the Macon Savings Bank.

Q. What became of the letter?

A. I took the letter up to the store, and I opened the mail that was there, and Mr. Benedict had not got down yet, and I got up to go to Benedict's house, and as I came on 4th street, between Delaware and Wyandott, I met him and showed him the letter, and he and I walked around to the store, and I do not remember ever seeing the letter after that. I thought he had it, and he says he thought I had it.

Q. Have you made any inquiry of him about it?

A. He told me to-day he did not have it. I never inquired before about it.

Q. Have you any knowledge whether it is in existence or not?

A. No, sir.

Q. Do you know of any place where you could look for it where it would be likely to be?

A. I do not, sir; unless it is with some letters at my house. I have not looked there.

Q. What is your impression as to whether it is there or not?

207 Objected to as incompetent.

A. I don't think it is, sir.

Q. State your best impression as to whether that letter is now in existence or not.

Objected to as incompetent.

A. I don't think it is. I don't know what has become of it. I have not seen the letter, that I remember of, since.

Q. Now, you may state the substance of the letter as nearly as you remember it.

A. My recollection is that it was merely a note to this effect, that the Macon Savings Bank had failed, and that we had better make an assignment here, and suggesting Charley Stewart as assignee; that is about the sum and substance of it, from my recollection.

Q. Do you remember any other feature of it? If you do, state it.

A. I do not, sir.

Q. What did you do, then, in pursuance of that letter?

A. What did I do?

Q. Yes; or Benedict, or either of you?

A. Well, I went out to see Stewart that morning directly after I went back to the store.

Q. What occurred between you and Stewart?

A. I talked with him about him acting as assignee, and he kind of—well, we talked considerable there. I couldn't tell you all the conversation now. He hadn't been to breakfast, is my recollection, and he got breakfast and we walked down town together, and he said he didn't care about—the sum and substance of what he said was that he didn't care to be put there; that he wouldn't do it for anybody else, or something of the kind; that it would prob-
208 ably involve some litigation; and we came down and went into Craig's office, I think, and he remarked there, either there or on the way down, that he didn't know about it; that Messrs. Karnes & Ess were his lawyers, and if he went into this matter he would expect them to be his lawyers. I didn't have any objection to that, as far as I was concerned, and after I went there I stayed there a short time. I don't know what was said; but Mr. Benedict was there and Mr. Craig and I went up to the store and left them there, and I think he finally—no, after awhile I went back there and I think he said then that he would act on the condition that we would make the banks here preferred creditors; and, I think, finally they went over to Karnes & Ess' and got up the papers. We talked a good deal there and, I think, we agreed to make the banks preferred creditors here in some shape in which they should be secured, and we did so, as far as I know.

Q. You say Mr. Stewart said he would act on condition that the banks were to be secured?

A. I think that is about what it was.

Q. Did he name any of the banks or just say the banks generally?

A. Well, I got from him the idea—the idea I got at the time was simply this, that as he had recommended us or had made some statement favorable to us he wanted the bank——

Q. Which bank?

A. The Kansas City Savings Association, now the Bank of Com-

merce—that he wanted the banks preferred, and I think he made the remark, if I recollect right, that "It will be better anyway to protect yourselves in case you ever want to go into business here again and want accommodation," or something to that effect.

Q. What did you next do after talking with Stewart?

209 A. Well, we agreed to make the banks preferred creditors, and we went over, I believe, to Karnes & Ess' office. I don't know whether the conversation was in Craig's office or there. You see it has been two years now, or will be to-morrow, and I don't remember all the conversation.

Q. Well, who prepared the deed or paper that was made to secure the banks?

A. I think Craig did, but I ain't certain.

Q. Henry H. Craig?

A. Yes, sir; I think he did.

Q. What time in the day was that done?

A. Well, I don't know; it consumed a good portion of the day, I think—that is, altogether. I think they got through along in the afternoon.

Q. Your recollection is that Mr. Craig made the deed by which the banks were to be secured?

A. That is my recollection, but I may be wrong about it.

Q. State what the firm of Karnes & Ess or either of them did in regard to the matter, in any way?

A. I don't know. Mr. Ess was there, I think. He may have drawn up the paper. I think, perhaps, Mr. Ess drew up a paper there, too.

Q. At the same time?

A. Yes; or he may have drawn it up and his clerk or some one copied it. I don't know; but it seems to me that is the way it was done.

Q. Now, calling your attention to Exhibit A, did you sign the name of Benedict, Melone & Co. to that paper?

A. Yes, sir; I did.

Q. In what way did you understand you were disposing of the property described in that paper?

210 A. I understood that we undertook to make the Bank of Commerce, the Bank of Kansas City, and the Citizens' National Bank three preferred creditors—that is, as I understood it, they were to have the first money that came in to settle their debts, or until their debts were liquidated, and after that the balance of the property was to go to the creditors.

Q. That is what you understood to be the effect of the paper you signed?

Objected to as leading.

A. Yes, sir; that is what I understood, whatever name you call it—an assignment or deed of trust.

Q. You understood the effect of the paper you signed to be the securing of the banks in the amount of the indebtedness to them and a distribution of the balance of the property among the other

creditors in proportion to the debts; is that a correct presentation of what you have stated?

Objected to as leading and suggestive of the answer desired.

A. Yes, sir.

Q. What was your purpose in going to see Mr. Stewart on the morning of the 16th of February, 1882?

A. Well, I went there with the understanding of getting him to act as assignee in the matter.

Q. Why was the property not assigned to him in the ordinary way, according to the direction and request which you received from your brother?

A. Well, sir, I could not tell you that, because I don't know.

Q. Do you know what time the receiver was appointed for Benedict, Melone & Co. by the court—that is, whether that day or the day afterward?

211 A. I do not.

Q. Do you remember who took the papers to the recorder's office?

A. I do not, sir; I might have known at the time, too.

Q. Who was it delivered to when it was executed?

A. I believe it was delivered to Charley Stewart.

Q. The trustee?

A. I think it was; I am not certain.

Q. Do you know who took the petition of Mr. Benedict to the judge of the circuit court to get the receiver appointed?

A. I do not, sir.

Q. State whether there was any agreement made among you that day as to who the receiver should be.

A. Well, Charley Stewart had the business; he was the man.

Q. Was that agreed upon at the office of Karnes & Ess?

A. Yes, sir.

Q. That he should be receiver?

A. Yes, sir; receiver. Well, I understand, when these debts were liquidated, so far as the receivership was concerned, that he was through with that when he took up the paper the banks held against us, and then he was trustee to hold the balance of the property for the balance of the creditors until they were paid, or something to that amount.

Q. Did you understand that he was to hold the balance of the property under the deed of trust or as receiver?

A. Well, under that instrument; I suppose it is a deed of trust; I don't know; I heard it read, too; I remember signing it there, and it was left, of course, to the attorneys to get it up in the proper way.

Q. What was your purpose and object in going to the office of an attorney after you had seen Mr. Stewart and consulted with Mr. Benedict about the matter?

212 A. Well, the purpose and object in going there was to make an assignment for the benefit of our creditors.

Q. You say your purpose in going to the office of an attorney after

you had seen Mr. Stewart and consulted with Mr. Benedict was to make an assignment for the benefit of your creditors; now, state what you did do and the order in which it was done.

A. Well, we went down to Karnes & Ess' office and they drew up the instrument of writing there after the matter was agreed upon what should be done—after we had agreed about the matter of making the banks preferred creditors; then they drew up the instrument which I term an assignment or understand to be an assignment; I don't know what you call it, but I have called it an assignment ever since, for the purpose of making the banks here preferred creditors, and leaving the balance of the property to go to liquidate the balance of the debts, and I understand we did that; that is what we went there for, and that is what we done.

Q. How about the appointment of a receiver: was that also done; were the papers prepared for that?

A. That was prepared, sir. I presume the attorneys, of course, knew their business and they decided among themselves; I suppose that that was the proper way to do, and that's what was done.

Q. During that day, before the preparation of the papers, did you see any officer of any of these banks that are mentioned in this paper?

A. I saw one; I saw two.

Q. Who were they?

A. Mr. Wilson, of the Bank of Commerce.

Q. What position did he hold in the Bank of Commerce?

A. I understand he is vice-president.

Q. You mean of the Kansas City Savings Association, it was then?

213 A. Yes, sir; he is vice-president, or I understand he is; I don't know.

Q. What occurred between you and him with regard to the matter of your failure and the indebtedness to their bank?

A. I saw him at the store, at our place of business first. When I went over to Craig's office from the store it was early in the morning, probably 9 o'clock then, and I saw him there first. I cannot remember the conversation that occurred at the time, but he had got the news in some way—probably by wire; I don't know—and he asked me about the failure of the Macon Savings Bank, what effect it would have on us here, and I told him what effect I thought it would have, and he wanted to be secured in the matter. We had some conversation there. I could not repeat the conversation, of course, now, but he was anxious to secure his debt in some way, and he left the impression on my mind anyway that he would run some attachments if he was not secured. I could not tell you exactly what he said.

Q. Did that occur before you went to Karnes & Ess' office?

A. Yes, sir; I think it was before.

Q. Did you have any conversation with either of the other bank officers?

A. I saw Mr. Cooper, of the Citizens' National Bank, that day. I had very little conversation with him, though.

Q. What was said about securing their indebtedness?

A. He asked me if we would secure them. I told him yes, and the other banks, and he went off. I saw him in Ess' office. I believe the balance had gone to dinner at the time he came into the room.

Q. Did he say anything about attachments?

A. I don't think he did.

214 Q. Who represented the Bank of Kansas City there, or did anybody—any attorney?

A. No person. I don't know that anybody did. I didn't see any of the officers of the bank there or anybody I knew in the bank, and I don't know that there was any attorney representing them there.

Q. The only two bank officers you saw was the vice-president of the Bank of Commerce, then the Kansas City Savings Association, and Mr. Cooper, of the Citizens' National Bank?

A. Yes, sir.

Q. Those are the only two bank officers you talked to about securing their debt?

A. Yes, sir.

Q. Were you aware at the time these papers were being prepared, and when you went to see Karnes & Ess, that they were attorneys for the Bank of Commerce?

A. No, sir; I was introduced to them. It was the first time I ever saw them.

Q. You did not know that then?

A. No, sir.

Q. Did the firm of Benedict, Melone & Co. ever transact any business after that day—February 16th, 1882?

A. No, sir.

Q. Who took charge of the business of the firm and the property after that day?

A. Mr. Stewart.

Q. Of the whole of it?

A. Yes, sir; we gave him the key that night.

Q. When was the firm dissolved?

Objected to as incompetent and not the best evidence.

A. As far as I know, it wound up then or about that time.

215 Q. State whether you had any intention to transact business any more under the firm name or as the partnership of Benedict, Melone & Co.?

A. Well, as to that, whether we would or not, I can't say; I never thought about it.

Q. Why was that suit commenced at this time—on that day—this suit by C. H. Benedict against you and your brother to settle the partnership?

A. I understood at the time that that was the way the attorneys agreed that it was proper to do it, and they did it in that shape, and I, of course——

Q. For what purpose, did you understand?

A. It was time to wind up—settle up the business concern of Benedict, Melone & Co.

Q. For what further purpose, or did you know of any other purpose for which it was done?

A. Well, the purpose was, as I understood it, to have Mr. Stewart take charge of the business and wind it up—pay the indebtedness of the concern, and, if there was anything left, of course give it to the partners.

Q. The purpose was to have Mr. Stewart take charge of the whole business?

Objected to as leading.

A. Yes, sir.

Q. Was there any conversation among you gentlemen there on that occasion as to how or in what way the banks could be alone preferred as creditors?

A. Certainly.

Q. If so, state the substance of what was said.

A. Well, I can't state the substance of all of it. I can state what I remember. I do not recollect everything that passed, of course. There was talk among the attorneys and ourselves as to the best plan to get at it, and they finally agreed among themselves—of course I didn't know anything about it—and they finally
216 adopted the plan that I suppose you have got there that I signed. Of course, there was considerable consultation among them; they understood it.

Cross-examination by Mr. Ess:

Q. How long had you been living in Kansas City prior to the time you signed the deed of trust, Exhibit A of this deposition?

A. I had been living here two years lacking a few days—fifteen or sixteen days.

Q. How old are you now, Mr. Malone?

A. I am 42.

Q. You have been in business all your life?

A. Yes, sir; pretty much all my life.

Q. What business were you in in Macon City—selling goods?

A. Yes, sir; I sold goods there awhile.

Q. How long had you been engaged in selling goods before you came to Kansas City?

A. Well, I don't know that. I should say eight or ten years; probably more than that.

Q. Prior to coming to Kansas City?

A. Yes, sir.

Q. When you came here you say you put $2,500 in that concern as capital?

A. Yes, sir.

Q. You were not a member of the firm of Benedict, Krausse & Co.?

A. No, sir.

Q. Was that $2,500 put in cash?

A. Yes, sir.

Q. You took care of the books, accounts, collections, and remittances?

A. Yes, sir.

Q. You knew what the assets of the firm were when you went in there, did you?

A. Well, I didn't know exactly; no. To go back to that: When I bought that concern out—that is, when I bought Judge Krausse out—I didn't buy it for myself. I bought his interest out for J. B., my brother.

Q. How much was paid for his interest; do you remember?

A. His interest was, I think, about five thousand dollars, and certain arrangements were made by which he took—no; I don't
217 think there was any cash paid, if you want that. There were terms of agreement made between them before I came here.

Q. Well, the result of the arrangement was that you had $2,500 interest in the firm?

A. Afterwards; yes, sir.

Q. How long were you here engaged in business with the firm of Benedict, Melone & Co.?

A. Well, under the arrangement when I bought Krausse out it was to date back to the first of January, 1880, but I did not get here until March, 1880. I bought him —, if I remember right, some time in February, 1880.

Q. Then you were here in the house from March, 1880, to February 16th, 1882?

A. Yes, sir.

Q. Where was your business house situated?

A. It was down at 411 Delaware street. It was 409 when I came here, and they occupied that until the first of January, 1881.

Q. Then where did you go?

A. Then we went to 304 Delaware street.

Q. You were engaged in the house from the time you came here, in March, 1880, up to the time you quit business, when you executed this deed of trust?

A. Yes, sir.

Q. How often during that time was your brother, James B. Melone, here to look after the business?

A. Well, he was not here very often; probably two or three times; maybe as much as four times.

Q. Was he then in the store?

A. Was he in the store at those times?

Q. Yes.

A. Yes, sir; he always went to the store when he came here.

Q. Who controlled the business here?

A. Well, Mr. Benedict stayed in the front part of the building—if you want me to give you that—the way we did our busi-
218 ness at the time. Mr. Benedict was considered the head of the firm and did the buying, especially buying the stock and keeping it up, and superintending the front office, and I took charge of the books in the back office.

Q. The books and bank accounts?
A. Yes, sir.
Q. You attended to the collection and remittances?
A. Yes, sir; most of the time.
Q. Now, what time was it on the morning of the 16th of February, 1882, that you got this letter from your brother?
A. Well, it must have been some place between 8 and 9 o'clock.
Q. Between 8 and 9?
A. Yes, sir; I do not recollect what time the train came in then. I met Mr. Saunders apparently coming up from the depot or coming down to the office.
Q. Had you prior to that time seen Mr. Craig?
A. I had not.
Q. Had you seen Mr. Stewart prior to that time?
A. I had not that day; I don't know when I had seen him before.
Q. Had you been to our office that day?
A. No, sir.
Q. You got that letter close to the corner of Delaware and 6th streets?
A. My recollection is that Mr. Saunders handed it to me on the steps there.
Q. Did you open it then?
A. I did as I walked up to the store.
Q. Did you notice the failure of the Macon Savings Bank in the newspapers that morning?
A. No; I had not seen the papers.
Q. Where were you living then?
A. Next to the corner of 15th and Oak.
Q. Where have you ever looked for that letter which was given you by Mr. Saunders?
A. I have not looked for it anywhere that I know of.
219 Q. You never paid much attention to it, did you?
A. I paid attention to it at the time I got it.
Q. You opened the letter and read it and took it around to the store?
A. Yes, sir.
Q. And there handed it to Mr. Benedict?
A. No; I handed it to him on 4th street between Delaware and Wyandotte.
Q. Who was the attorney of Benedict, Melone & Co. at that time?
A. Mr. Craig did our business here.
Q. Well, after you handed that letter to Mr. Benedict he read it?
A. Yes, sir.
Q. Where did you both go then?
A. Into the store.
Q. How long did you remain there before going to Craig's office?
A. Well, I didn't go to Craig's office from the store. We didn't remain there very long, not over 15 minutes, maybe—I can't say—but after talking about the matter I went out to Charley Stewart's and came back with Mr. Stewart to Craig's office and Mr. Benedict was there.

Q. Where was Stewart living then?

A. I believe it is Locust between 12th and 13th.

Q. Did you find him at his residence?

A. Yes, sir.

Q. What did you tell him?

A. I told him about the failure of the bank and spoke to him about having received this letter and wanting him to act as assignee if we made an assignment.

Q. Did you show him the letter?

A. No, sir; I don't think I had the letter with me. I did not show it to him if I had. I do not remember seeing the letter since showing it to my brother.

Q. Now, you were in our office and Craig's office during the 16th?

A. Yes, sir.

Q. Did you show that letter to Mr. Craig, to Mr. Karnes, to Mr. Stewart, or myself?

A. No; I did not. I am satisfied I did not.

220 Q. Then you and Stewart, from his residence, went to Craig's office?

A. Yes, sir.

Q. Who did you find there?

A. We found Mr. Craig and Mr. Benedict. If there was anybody else in there I don't know it.

Q. Do you remember my coming in there while you were in there?

A. My recollection about that matter is that you came while I was gone up to the store, and when I came back you were there. I don't think you came in there while I was there.

Q. How long did you remain there at Craig's office?

A. O, well, it was not long; I don't remember; not very long. I should not say it was more than half an hour.

Q. What was discussed while you were there?

A. Well, sir, I do not remember what was discussed.

Q. Do you remember anything being said about the amount of the assets and the amount of liabilities?

A. I don't know that I do. There may have been, and, I presume, was.

Q. Where did you go from Craig's office?

A. It strikes me that I went back to the store; I am not sure.

Q. What time did they all get around to our office?

A. When I came down there I came to your office, I think it must have been, somewhere about ten o'clock.

Q. You were not acquainted with me before that time, were you?

A. No, sir; I do not remember to have seen you.

Q. Well, you say you got there about ten o'clock, you think?

A. Some place along there. I can't remember the exact time.

Q. Do you remember any discussion there as to the amount of your debts and the amount of your assets?

A. I think there was something of the kind there.

Q. The first thing that was determined on was a deed of trust to the banks, wasn't it?

A. I think that probably was, whatever instrument it was.

221 Q. Don't you remember that I was the attorney of the Kansas City Savings Association, and that I started to draw a deed of trust for it, and it was stated by some one there that the Bank of Kansas City must be put in; that you owed something there?

A. I know something was said about that, and I know somebody suggested—me or Mr. Benedict—that we wanted to treat all alike.

Q. Who was it that went to the Bank of Kansas City to get what notes they had, so that they could be secured?

A. I do not remember.

Q. Don't you know that I went out of the office and went down to the Bank of Kansas City and got what notes they had and showed them to you and asked you if they were right?

A. I know that you showed me the notes, or that I saw them there, and stated they were right. I don't know that you got them, though.

Q. Well, then, we were going ahead to draw the deed of trust to secure the Kansas City Savings Association and the Bank of Kansas City, and then Mr. Cooper, of the Citizens' National Bank, came up and said they had $1,500?

A. Yes, sir; Mr. Cooper came in.

Q. And then we concluded to put that in the deed of trust, too?

A. Yes, sir.

Q. The deed of trust was not then completed?

A. No; if I recollect right the first time I saw Cooper there—well, I know he spoke to me about it—my recollection is that Cooper came in and spoke to me about the matter, and I am satisfied it was while Benedict was at dinner. He may have come up afterward, too; if he did I do not remember it.

Q. All of them were out at dinner at that time?

A. It appears to me that way.

Q. Well, you stated that it would be all right; to put the

222 $1,500 in?

A. Yes, sir.

Q. Now, who was drawing up that deed of trust?

A. Well, my recollection about that deed of trust was that Craig drew it up—that is, he did the writing. I think, probably, you may have written it in lead pencil and he copied it.

Q. And, then, after it was written out at length by Mr. Craig Mr. Stonestreet copied it out on the type-writer?

A. I do not know Mr. Stonestreet, but it was the young man in your office.

Q. Mr. Craig was there dictating it to him or reading it from his paper?

A. I think so.

Q. What time in the afternoon was it when you signed that paper?

A. I think it must have been about 4 o'clock in the afternoon; somewhere along there.

Q. Do you remember making the acknowledgment before Henry Stonestreet?

A. I made the acknowledgment before somebody there; I do not remember the name.

Q. Now, in the morning, when you first came to our office, don't you remember that we discussed as to the amount of your liabilities on the one side and the amount of your assets on the other?

A. Yes, sir; I remember that.

Q. How much was the net amount that would be left to the firm after the payment of these liabilities, as we then considered it?

A. Well, there was an amount showed by the books somewhere between twelve and eighteen thousand dollars; that was according to the figures we had.

Q. You really expected that it would be all right; you really supposed that there would be $18,000 left after the debts were all paid?

A. Yes, sir; that was the conclusion we came to.

Q. Don't you remember that one reason why we didn't want to make an assignment was that there was no use to make an
223 assignment if you had more than enough to pay your debts?

A. I know there was a good deal of talk one way and another how to make that the best way, and these things were mentioned; that it was best to do this way or that way; different reasons given. I cannot remember them all. I paid attention to them at the time, but after the matter was concluded upon it passed out of my mind. I cannot remember the conversation that occurred there.

Q. Don't you remember that that was the principal discussion of the entire day?

A. Well, I know that was one, and I remember the points of it.

Q. Don't you remember that it was there proposed to go ahead with your business anyhow and not make a deed of trust or assignment there?

A. Somebody asked that question—that they did not see any use of it—and the question was answered about this way: That my brother having failed down there that other creditors might come in and make attachment on his interest on the concern and get us into difficulty.

Q. And that is the only reason why you did not go on in business?

A. Well, I don't know that it was the only reason. Of course, all the reasons that were thought of then were discussed.

Q. Don't you remember that this was discussed—that if an assignment was made Mr. J. B. Melone would have to sign it, and that we have to make out the paper here and have it signed and acknowledged by you here and then send it to Macon City to be signed and acknowledged by him there?

A. Yes, sir; there was something said about that, and I believe the lawyers who had it in charge said that to make an as-
224 signment it would be necessary to have James' signature.

Q. You did not show the letter to Mr. Craig or myself either on that day; the letter you had received from J. B. Melone?

A. I don't think I had the letter. No, sir; I didn't show it to him, I don't think.

Q. Don't you know that it was contended there that there was no use of making an assignment if you were going to have $18,000 overplus?

A. Well, I know there was something of that kind stated there.

Q. Wasn't it discussed there that there might be the only trouble of the individual creditors of J. B. Melone coming in and undertaking to take his share of the partnership property, and thus break up your business?

A. O, I know that matter was discussed; there was a thousand and one things discussed there that day, and I cannot remember all of it.

Q. Don't you remember that we finally came to the conclusion that whatever he had there we would bring into court in a suit to wind up the partnership and ascertain what he had; that it would then be in court and his creditors could get it if they wanted it?

A. Yes, sir.

Q. Now, you remember about this suit that was commenced after the conclusion was had to wind up the partnership?

A. Yes, sir; I understood it was to wind up the concern.

Q. Don't you remember being asked as to whether this partnership had written articles or whether it was all verbal?

A. I do not remember; it may have been asked.

Q. Don't you remember inquiries being made as to whether there was any definite time the partnership was to run?

A. I think there were such inquiries.

Q. Was there any definite time for the partnership to run?

225 A. My remembrance is there was not.

Q. You have been in business ever since you have been of age, more or less?

A. Well, I have been in one kind and another—yes, sir; most of the time. I have never "loafed" a great deal.

Q. How long have you lived in the State of Missouri?

A. I have been living in the State of Missouri a little more than 42 years.

Q. You know what a deed of trust is under Missouri law, don't you, or a chattle mortgage?

A. Well, yes; I believe I know a deed of trust.

Q. You knew, when you signed Exhibit A to these depositions, you were making a deed of trust of your property, didn't you?

A. I understood that to be a deed of trust or a deed with a power to turn over to Mr. Stewart all the assets of Benedict, Melone & Co., as I stated awhile ago, for the purpose of securing these banks for their amount, which was about $19,000, if I recollect right, and then the balance of the creditors; that's the intention of it.

Q. You did not suppose this deed of trust was to secure anybody else except the three banks?

A. Well, I supposed the property was all to be turned over to Mr

Stewart for the benefit of the creditors, and one part, as I understood it, was for the purpose of securing the banks.

Q. That was the deed of trust?

A. Yes, sir; that portion of it; then, after they were paid first—then the balance of the creditors were to be paid likewise.

Q. You did not understand that the balance of the creditors were provided for in the deed of trust?

A. Well, I understand that we provided for the banks first and then the balance of the creditors.

226 Q. Did you understand that by the deed of trust you provided for the creditors other than the three banks?

A. Well, I understand that the deed of trust—I was always under the impression that the deed of trust was for the benefit of the banks, and then the receivership was to dispose of the balance of the money.

Q. You did not read the petition that was drawn up, did you?

A. It was read to me. I didn't read it—well, maybe I did.

Q. Don't you remember that the petition was read over to you—the petition filed in court for the appointment of a receiver?

A. If it was read over to me I do not remember it. It may have been.

Q. Don't you remember my asking you about the amount of capital each of the partners had?

A. Yes, sir; I remember that.

Q. Don't you remember about my asking you what would be left, after paying all the debts and liabilities, for distribution?

A. Well, I remember that question being asked a half dozen times that day. I don't know that I answered it, or who answered it, but it was answered by one of us, and we thought it sufficient at the time.

Q. Do you remember whether the petition was sworn to or not?

A. I don't know whether—yes; I guess it was sworn to; by Benedict, I suppose.

Q. Don't you remember, Mr. Melone, that after this deed of trust was drawn up—that then I had to go around to see Mr. Wilson and get his permission to act for you or Mr. Benedict in this winding-up proceedings?

A. That you had to do what?

Q. That I had to go around and see Mr. Wilson and get the consent of the bank to act as attorney for you in the winding-up proceedings.

A. I don't know anything about that, sir.

Q. You say this deed of trust, Exhibit A, was read over to

227 you before it was signed?

A. I think it was read to me or I read it.

Q. Don't you remember that Benedict read it over, or it was read to him?

A. I don't know; I suppose he heard it read.

Q. Don't you remember that at the time you signed it both you and Benedict were in the back room, at our table at the southeast corner of the north room, and it was read over to you there?

A. I know it was either read to me or I read it, and he was present, of course, in the room. I don't know where the room was located, of course, but we were there all the time after dinner, as I remember.

Q. What time did you leave your office that evening?

A. Well, I suppose it was after four o'clock; probably a little later than that. I don't know that I got up and went right out after signing the paper. It was somewhere along between 4 o'clock and five and six.

Q. What time did you turn the key over to Stewart?

A. I turned the key over to Stewart, I think, before I left your office. I did not go to the store that evening; I went home.

Q. Didn't you turn the key over to Mr. Wilson, of the Kansas City Savings Association, to be delivered to Stewart?

A. Well, I don't think I did, but I may have done so. I turned the key over to some one; I think it was Charley Stewart.

Q. It was ultimately given to Stewart, anyhow?

A. Yes, sir.

Q. How long was it after the 16th of February—the time this deed of trust was made—until attachments commenced to be made on the property?

A. My recollection is there was an attachment run on the next day, in the evening.

Q. That was Plankington & Armour's?

A. Yes, sir.

228 Q. Well, how long was it until some others were commenced?

A. It seems to me it was three or four days. I really couldn't tell you; it was some time.

Q. Wasn't it three or four weeks?

A. Well, some time; I can't say. I remember that was the first, and that it was some time before there was any more. Of course I can't tell them all.

Q. Don't you remember that there was no other attachment except Plankington & Armour's until we found out that there was some $40,000 of debts at Macon city, and that then the attachments came in very thick and fast?

A. I don't know exactly the time. I know that Plankington & Armour run an attachment the next day, and then there was some interval before there was others, and there was others, a great many, but I don't know how many.

Q. You defended them?

A. I suppose the attorneys did.

Q. We defended them—the firm of Karnes & Ess?

A. I suppose so.

Q. Do you remember whether you made the pleas in abatement in the cases, or whether it was Benedict?

A. I don't think I did; I don't know.

Q. You were a witness in the attachment cases that were tried?

A. I don't think I was. I believe I was examined, too—I don't

know whether I went on the stand or not. I believe I did in some of them; yes, sir.

By Mr. DEAN:

Q. You lived at Macon city some time previous to your coming here?

A. Yes, sir.

Q. How long have you lived in the State of Missouri?

A. Well, I have lived in the State of Missouri all my life; I was born here. I have lived here all the time except a little while after the war, eight or nine months.

Q. When that deed of trust was read to you, you under-
229 stood it, didn't you?

A. Yes, sir; I understood it.

Q. At that time it was perfectly apparent to you, wasn't it?

A. Yes, sir.

Q. And you signed it willingly and knowingly?

A. Yes, sir.

Q. And done it on the same day that proceedings were instituted in the circuit court for the appointment of a receiver?

A. I understood there was a petition to dissolve the partnership or something of the kind.

Q. And that petition was sworn to by either yourself or Mr. Benedict?

A. If sworn to at all; I didn't swear to it, I don't think.

Q. You understood what was in that petition at the time you signed it?

A. Yes, sir; I understood the general purport of it.

Q. Were you one of the complainants or defendants in that suit?

A. I was one of the defendants.

Q. It was agreed that Mr. Benedict should be the plaintiff and that you and your brother should be defendants, and Mr. Craig entered your appearance to the proceeding?

A. I don't recollect anything about that.

Q. But whatever was in that petition or whatever it called for was understood by you at the time?

A. Well, it was understood in this way: These petitions, or whatever you term them, were gotten up for the benefit of the creditors of Benedict, Melone & Co., with these three parties preferred, and that matter was left to the lawyers.

Q. You knew there a deed of trust in which the banks were preferred and that proceeding was instituted to wind up the partnership and to appoint a receiver to equally distribute the property of the firm after the banks had been paid in full?

A. That was my understanding of the matter.

230 Q. You heard nobody call it an assignment there at the time, either yourself, your attorneys, or anybody else?

A. Yes, sir; I don't know that they called it an assignment.

Q. You didn't hear at that time, either by Craig or the court, or Karnes & Ess, this paper called an assignment?

A. I didn't hear anything about it.

Q. You had understood that Mr. Stewart was appointed receiver?
A. Yes, sir.
Q. You also understood that he was trustee in the deed of trust?
A. Yes, sir; for the benefit——
Q. Of these banks?
A. Yes, sir.
Q. Now, when you wrote to your brother you wrote your understanding of the thing; what it was at the time?
A. Yes, sir.
Q. You had no reason for prevaricating or misrepresenting the situation?
A. No, sir; I did not do it, as far as I know.
Q. You stated to him what had been done to the best of your knowledge and ability?
A. Yes, sir.
Q. If you understood at the time that Mr. Stewart was receiver, you so wrote, did you not?
A. I expect I did, sir. I can't say anything about what I said in that letter now. The point I made in the letter was simply this, if I remember *or* right: The question came up in some way; somebody had written to me from down there; I think it was the assignee of the Macon Savings Bank, and they wanted to know what we did down here, and I wrote to him and told him, as I understood the matter then and as I understand it now, and I wrote the same thing to my brother, that I understood that we had made a preference of these creditors here. I may have called it an assignment. I suppose quite likely I did. I told him that we had preferred the three
231 banks, and that the balance of the property was to go to the benefit of the creditors; that is what I understood the proceeding was at the time, and that is what I understand yet.
Q. But if you heard nothing about an assignment at the time, and if it was understood at the time that an assignment could not be made because J. B. Melone was not there and because it would be necessary, according to the advice of your attorney at the time, to have his signature before an assignment would be valid, and it was therefore necessary to go into court and have a receiver appointed instead of having an assignment, could you have written concerning an assignment when you were expressly told at the time by your attorneys that an assignment was impossible?
A. Yes, sir; I may have written them that.
Q. You think that although you were told that an assignment was impossible and that something else would have to be done instead of making an assignment that still you wrote them that an assignment was made?
A. I don't know that I did, sir; but I say it is very likely that I may have done so.
Q. You, however, did, as far as your recollection is concerned—you did attempt to express and represent in that letter to him and to your brother the correct status of things here at the time?
A. Yes sir; that is what I tried to do.

Q. Now, you knew that Stewart had been appointed receiver by the court?

A. Yes, sir; I knew it. I suppose the court appointed him. I knew it was done a few days afterward.

Q. And you were made a defendant in the proceedings for the purpose of having him appointed receiver?

A. In this petition—yes, sir.

Q. When did you see your brother after that?

A. When I saw him here at court, last fall some time.

232 Q. Was that the first interview you had with him from the time of the appointment of the receiver until then?

A. Yes, sir; I never had seen him before that?

Q. You had written to him frequently?

A. Not very frequently.

Q. You wrote to him several times while Mr. Stewart was in the store selling out things as receiver?

A. I don't think I did; I don't think I wrote him over two or three times.

Q. Did you explain then how things were going on here?

A. No; I do not remember doing it, sir.

Q. Did he ask for information concerning the progress of matters up here in which you were bound to the extent of a hundred thousand dollars?

A. He wrote to me at one time after the stock had been sold that he would like to have a copy of the sale book.

Q. Of the receiver?

A. Yes, sir; and the amount of the assets and liabilities of the concern, as an interested party; as he had never had them he would like to have them. That is about the purport of his letter.

Q. Have you got that letter?

A. No, sir.

Q. Can you produce it?

A. I can't say; I may have it at home.

Q. Will you make search for it to-night?

A. Yes, sir.

Q. Together with any other letters you may have?

A. Yes, sir.

Q. You do not understand now, nor have you understood at any time, that either Mr. Craig or Mr. Stewrrt or Mr. Karnes or Mr. Ess or Mr. Stonestreet, who took your acknowledgment to that instrument of writing, in any shape or form, misrepresented the facts to you?

A. Why, no, sir; of course not.

Q. In your letter, in which you informed your brother that

233 you had preferred these banks here, you specified that it was by a deed of trust, did you?

A. I don't know, sir; I don't remember what was in that letter exactly, nor neither can I remember what I wrote to Web Ruby; it is so long ago. I simply wrote them what had occurred as I understood it.

Q. Now, you have been a book-keeper as well as a general business man?

A. Yes, sir; I have kept books.

Q. You aim to be accurate in your statements of things?

A. Yes, sir.

Q. If you advised them of this preference being given to the banks don't you think you must have advised them as to the manner in which it was made—that it was by a deed of trust on the property?

A. Well, I may have done so; I do not know that I did, sir. I may have told them simply this about the matter: That we had made an assignment, or whatever you might call it, and, perhaps, more than likely, I did call it an assignment—I don't know whether I did or not; I say I may have done so, or I may have said it was something else, but I told them we had preferred the banks here, and probably gave them some reasons why we did do it; and one of the reasons was, as I have told you before, that Mr. Stewart, being the party selected by my brother in the first place, and, being acquainted with him, I preferred him to do it, and he wanted those banks or one of them, especially, preferred because of matters that had occurred before. I felt like accommodating him, and I wanted him to act, and for the further reason that I wanted to be on as good terms with these institutions as possible. I expected to live in Kansas City at the time, and have been living here since—until a short time ago.

Q. And you supposed at that time that your assets considerably exceeded your liabilities?

A. Yes, sir; on paper they did, sir.

234 Q. At that time this indebtedness to the banks in Macon was not included in your liabilities, and in your statement to the receiver were not included?

A. I did not make any statement to the receiver, only verbally; none from the books, and I had not kept the books then since the first of January, and that was the 16th of February.

Q. At the time this proceeding was had in which Mr. Stewart was appointed receiver you gave him a statement of the assets?

A. I think both myself and Mr. Benedict did; I can't say.

Q. You furnished a statement of the assets and liabilities at that time to Mr. Karnes?

A. We furnished him some data on the basis of the invoice of January 1st.

Q. Don't you know that when the debts against the estate in the hands of the receiver were presented for allowance that the debts equalled the amount you represented without including the debts to the banks?

A. I don't know whether they did or not.

Q. Don't you know that the newspapers contained a statement the next morning of debts that have since been shown to be your commercial liabilities?

A. What?

Q. Don't you know that the statement you furnished the newspapers at the time of your liabilities amounted to what they have

since been established in the courts to be, not including the banks' indebtedness?

A. I did not furnish the newspapers any statement.

Q. Who did?

A. I don't know, sir.

Q. Did your brother write you concerning his troubles in Macon?

A. Before or after?

Q. At any time along. Were you not aware of the fact that he was in trouble at Macon—that he had been indicted at Macon?

A. When do you mean?

235 Q. At the time or immediately after.

A. I don't know, sir. I knew it, of course, some time afterward. I don't know when.

Q. Now, you think you wrote but two or three letters to your brother and partner liable with you for an amount over a hundred thousand dollars concerning the proceedings that were being had here in relation to the affairs of Benedict, Melone & Co. from the time Mr. Stewart was appointed receiver until he came up here?

A. I don't know exactly how many; it wasn't a great many.

Q. Mr. Melone has never objected in any shape or form to this appointment of a receiver, has he?

A. He has never objected to me.

Q. Nor to the execution of the deed of trust to the banks?

A. Not that I know of, sir.

Q. He has never complained in any shape or form, and does not now?

A. He has not as far as I know.

Q. On the contrary, he has approved of your action, has he not?

A. I suppose so. I don't know.

Q. You have never heard any complaint from him?

A. He may have written to me something about it at the time. It strikes me he probably did in one letter I got from him; if I recollect right he said in one letter to me that I ought to have made a straight-out assignment, without any preferred creditors.

Q. But he didn't object to it?

A. No, sir; I don't think he made any more objection than that.

Q. You advised him that you did the best you could under the circumstances?

A. I thought I did.

Q. And you think so yet?

A. Yes, sir.

236 Q. Have you got that letter you referred to in your last answer?

A. Well, I do not know whether it is there or not; there are some letters at my house that I moved from here. I suppose they are there yet; the letters I had here I tied up in a sack and took home, and there are some there that Jim wrote me, maybe.

Q. You mean at Liberty?

A. Yes, sir; well, I say so. I don't know whether my wife has moved them away or not. I think they are there.

Q. Aren't you interested in having your conduct sustained here?

A. Yes, sir. I don't think my brother would question anything I done, sir, and I would not question anything he did, because I would suppose he did the best he could.

Q. And you would approve what he did?

A. Yes, sir. I never was connected with him in a business way except in these transactions and keeping books for a short time during the war.

Q. So you understand that you represented him, and that he had sustained you in what you did?

A. I understand he has never made any objection to me.

Q. Did you ever make any objection to this matter?

A. I never did.

Q. Were not the objections made to-day the first you ever heard from your brother?

A. Well, I don't think he made any here to-day.

Q. Well, you simply get it from the counsel on the other side?

A. Well, I understand there is a suit pending here. I got some letters from some parties—one from Sam. Griffith.

Q. Who is he?

A. He is cashier of the bank at Bowling Green.

Not being able to continue the further taking of these depositions on this day, by reason of want of time, I adjourn the same
237 to again be continued at 9 o'clock on Saturday, February 16th, 1884, at the same place and by the consent of counsel for complainants and defendants.

JULIUS C. HUGHES,
Notary Public.

Pursuant to adjournment, as above stated, on the 16th day of February, 1884, at 9 o'clock a. m., I continued the further taking of said depositions as follows, to wit:

R. A. MELONE recalled on behalf of complainants.

Re-examination by Mr. DYSART:

Q. Since adjournment yesterday afternoon have you searched for the letters spoken of yesterday?

A. Yes, sir.

Q. State how you searched for them.

A. Well, I looked through all the papers I have at my residence and I could not find the letters there, and I know of no place else to search for them. Those are all the letters I have.

Q. You looked where you keep such papers?

A. Yes, sir.

Q. State what letters you made search for.

A. I looked for the letter spoken of with regard to my brother writing here after the failure of the Macon Savings Bank directing us what to do, and there was another letter written some time afterward, which I searched for, but could not find any of them.

Q. You mean the letters you received from your brother, J. B.

Melone, which you were asked about on your cross-examination yesterday?

A. Yes, sir.

Q. State, as nearly as you can, the contents of the letter you received from your brother after the assignment in reference to what you had done, and state if that was an answer to the letter you wrote him telling him what you had done.

A. Well, my remembrance of the letter is just—of course, I cannot give you the contents of the letter entirely, but my
238 impression was——

Q. Was that an answer to your letter?

A. It was an answer to a letter I had written him in regard to what had been done here.

Q. Now, give the contents of it as nearly as you can.

A. I think the portion alluding to that was about to this effect, that he understood from what he saw in the papers or what he heard that we hadn't made any assignment at all, and we had worked a great injustice to him. I don't know that that is the language of the letter exactly, but that is the purport of it.

Q. State what further there was on that subject, if anything.

A. I don't know that I can give you anything further than that, because it has been so long ago, but there may have been something more.

Q. To refresh your memory, did he express any acquiescence or dissent?

A. Well, I inferred from what he said that he was not very well pleased with the matter as it stood, as it was a detriment to his interests down there.

Q. Do you remember any other correspondence on that subject between you and your brother?

A. I do not.

Q. You think that is the only letter you received on that subject?

A. Yes, sir.

Q. How soon did you see him after that to converse with him?

A. O, it must have been—I don't remember the date of the court here, but it was at court last fall. It must have been a year and a half, I suppose. I don't know whether it was quite that long or not, but it was something over a year.

Q. By way of refreshing your memory I will ask you if that letter contained anything about his first letter of instructions to you?

239 A. Well, there was nothing more in the letter that I remember of now. Of course, the recollection I have of the letter is what he said, and I inferred from it that we had not carried out—or, as you might say—an assignment; in fact, he used the language "assignment"—is about the idea I got from him. He had heard it.

Q. He complained that you had not carried out his instructions?

A. Yes, sir; about that.

Q. I will ask you if you know the financial or pecuniary condi-

tion of the members of your firm of Benedict, Melone & Co. since the failure?

A. Yes, sir.

Q. What is and has been since that time the pecuniary condition of your brother James B.?

A. Well, he has been insolvent.

Q. If he had any property at the time of the failure of the Macon Savings Bank, state what he did with it.

A. My understanding was it was all turned over——

Objected to as incompetent.

Q. Has your brother had any property of his own since the failure of the Macon Savings Bank?

A. No, sir.

Q. What has your brother James been doing since that date?

A. He has been clerking for a brother-in-law.

Q. In what?

A. In a grocery store.

Q. At the little town of Jamesport, Missouri?

A. Yes, sir.

Q. What has been your pecuniary condition since the failure of the firm of Benedict, Melone & Co.?

A. I have not had anything.

Q. What has been the pecuniary condition of C. H. Benedict as to solvency?

A. Well, he has had nothing, as far as I know, except the salary he is getting where he is working.

Q. State if a debt could have been collected from either of you by law since that date.

A. I understand not.

240 Q. State what you and Benedict had in property otherwise than that engaged in the business of Benedict, Melone & Co.

A. I had a house a portion of the time in Macon, Missouri.

Q. Worth about how much?

A. I sold it for $1,150.

Q. I mean at the time of your failure.

A. No; I had no property but what was in the business, except household goods at home. Well, yes; I had some stock in the Macon Savings Bank at the time—$2,200.

Q. State if that has proved an utter loss.

A. Yes, sir.

Q. Then the firm of Benedict, Melone & Co. and its members has been insolvent since that date?

A. Yes, sir; so far as I know.

Q. You stated in your cross-examination, I believe, that when you went to the attorney's office to have the assignment made the condition of the firm of Benedict, Melone & Co. was spoken of?

A. Yes, sir.

Q. And something was said about the difference between the assets and liabilities?

A. Yes, sir.

Q. The statement referred to then was made when?

A. Well, the only basis we had was the invoice of stock taken on the 1st of January, 1882.

Q. You may state if at that time there was a calculation or estimate made as to the condition of the firm, its property and indebtedness, with a view to ascertaining how it stood.

A. Well, there was an approximate estimate, I suppose.

Q. From the basis of the January statement?

A. Yes, sir.

Q. Was that statement taken from the actual value or the face value?

A. It was taken from the face value, of course.

Q. Any allowance made for bad debts?

A. I think not, sir.

Q. Depreciations?

A. Of course not; I don't know that there was.

Q. Or accommodation acceptances?

241 A. No; we kept no record of accommodation acceptances at all.

Q. Were there some?

A. Yes, sir.

Q. Amounting to about how much?

A. Well, my recollection about the matter is that it was somewhere between nine and ten thousand dollars. I can't say. These things can be gotten at more accurately.

Q. Are you able to state now the amount of bad debts the firm had—that is, that proved to be bad?

A. That is, in the wind up of the concern?

Q. Yes; bills receivable and accounts failed to be collected.

A. My recollection is that it was about $25,000.

Q. Are you able to state from your knowledge or information the amount of the depreciation of the goods disposed of by the receiver, about?

A. My recollection about that matter is that it was three or four thousand dollars. I do not remember now. That can be gotten at by the books of the receiver.

Q. That will be shown by the different invoices of cost prices and the difference between them and the proceeds of sales?

A. Yes, sir.

Q. Did this January statement include the whole amount due the two Macon banks?

A. No, sir; it did not include the accommodation paper that I told you of. We had no record of that paper at all. That paper was always protected by the Missouri Coal Mining Company.

Q. This January statement, showing the liabilities of Benedict, Melone & Co., did it include what your firm owed to the two banks at Macon?

A. Well, it didn't include—of course, we knew what the concern owed to the Macon Savings Bank.

Q. Did you put it in the statement—was it in the statement

that was spoken of there in the attorney's office when you
242 went in to have the assignment made?

A. I don't know whether it was or not. I don't think it was.

Q. In other words, I want to know whether the indebtedness to the banks down there was exhibited to these parties.

A. I don't think it was.

Q. Then the $30,000 was to be added in to get at the true statement?

A. Yes, sir; it was finally added in in the wind up.

Q. Well, at that time was it exhibited to the creditors?

A. The nine or ten thousand dollars we had no record of—that is, we did not have the exact amount.

Q. Well, were the legitimate debts to these two banks put into the statement?

A. I don't think there was anything said about it.

Q. To refresh your memory I will ask you if it was not claimed then by Mr. Benedict or some of them that the amount due the Macon Savings Bank was only $5,000?

A. I could not say as to that.

Q. Now, I will ask you if you did not represent to the parties at that time that there was money due to these banks at Macon?

A. What parties?

Q. To the attorneys there that drew up the instrument and all the parties who were there doing it or having it done—did you or not make known the fact that there was money due to these banks?

A. I don't know whether I did that day or not. I did a few days afterward, if not then.

Q. Are you confident you did it then?

Objected to as leading.

Q. What is your best impression about it?

A. My best impression is that I made very few statements at all that day to anybody.

Q. I believe you said in your cross-examination that you
243 did not make this statement?

A. Yes, sir.

Q. You had been book-keeper up to what time?

A. The 1st of January.

Q. Who was book-keeper after that?

A. Mr. E. P. Lyle.

Q. The firm hired him to keep the books?

A. Yes, sir.

Q. He was not a member of the firm?

A. No, sir.

Q. I will ask you, Mr. Melone, if by the proceeding you took on that day, February 16th, 1882, you disposed of or appropriated the whole or entire property of your firm?

A. We did, sir.

Q. You may state now what control or interest you have had in it since that date.

A. I have not had any—any more than I helped Mr. Stewart for a month or so collecting some debts around town here.

Q. He hired you to do that?

A. Yes, sir; he paid me for it.

Q. Now, the instrument you signed that day and the suit you commenced, were they parts of the same transaction?

A. Well, it was all done at the same time.

Q. Would one have been done without the other?

A. I suppose it could have been done one without the other, but it was not done.

Q. What was the intention?

A. Well, the intention was to turn over the property to the creditors after paying the banks which were preferred.

Q. You spoke in your cross-examination about needing the signature of J. B. Melone to make an assignment; state if that is the reason an assignment was not made for the benefit of all the creditors alike.

A. I don't know whether that was the primal reason; that was spoken of. I told you yesterday that the reason that influenced me to make the preferred creditors as was made was merely from the fact that Mr. Stewart objected. He wanted some of the banks
244 preferred at least; and the same reasons that I recited yesday are the reasons that we concluded to prefer these banks.

Q. Is not this the fact: After going to the office of the attorneys you concluded to prefer the Kansas City banks, and you left to your attorneys the mode in which it was to be done?

Objected to by respondents' counsel as leading and suggestive of the answer desired.

A. Why, certainly.

Recross-examination by Mr. DEAN:

Q. Mr. Melone, is your recollection of the contents of the letter received from your brother better this morning than it was last evening when you were on the witness stand?

A. I don't know that it is, specially. I have been studying over it somewhat, sir.

Q. You have also, you claim, been hunting for the letters which passed between your brother and yourself, have you?

A. Yes, sir.

Q. Who assisted you in that search?

A. No, one. I think my wife got the letters for me.

Q. You found none of those desired?

A. No, sir.

Q. Did you regard that letter of any consequence when you received it?

A. I regarded it no more, I suppose, than any private letter of mine.

Q. You never exhibited it to Mr. Stewart?

A. I never exhibited it to Mr. Stewart.

Q. You never exhibited it to your attorneys?

A. No; I never exhibited it to my attorneys.

Q. You never exhibited it to any person?

A. I don't know that any person ever saw it except my wife. She may have seen it.

245 Q. So that, as a matter of fact, no person saw that letter unless it be your wife?

A. Which one do you refer to?

Q. I refer to your letter of your brother containing his expression of dissatisfaction concerning the disposition that was made of the property here.

A. I don't know that anybody say that except my wife, and I don't know that she saw it.

Q. Your brother stated in this letter that he learned that you had not made an assignment, but had had a receiver appointed?

A. He didn't say anything about a receiver. My recollection is that he said we had not made an assignment at all.

Q. And he had learned that from the newspapers?

A. Yes, sir; or what some one told him. There was quite a number of rumors, you know. If my memory serves me right, I think he said he got it from the newspapers what he learned.

Q. He did not request you in any way to present any objections, did he?

A. I don't think he did.

Q. He didn't make any objections; he simply suggested that you might have pursued another course, which would have been preferable?

A. His objection was what I have stated.

Q. Then it was merely a criticism of your conduct?

A. He said, I think, that it was detrimental to him, and that he would have preferred that we had pursued another course.

Q. So that it amounted to a mere criticism of your conduct?

A. His objection was that we hadn't properly pursued his suggestion in his former letter—that is, the first letter written to me.

246 Q. Now, then, as a matter of fact, is not what you stated yesterday in your examination a true view of the case, that he never did make any objection, but simply criticised your conduct, but expressed himself as thinking you might have pursued a course more wise than the one you did take; isn't that it?

A. Well, my construction of it is about that.

Q. Is that your recollection?

A. That is my recollection of his objection or criticism, whatever you may call it.

Q. He did not request you to go and repudiate your action or inform Mr. Stewart that he was not authorized to act?

A. No, sir.

Q. You continued right along assisting Mr. Stewart as far as you could?

A. I did not stay there very long, as my family was taken sick. I was there probably about a month.

Q. Well, you and Mr. Benedict, the resident members of the firm

of Benedict, Malone & Co., assisted Mr. Stewart in acting in the capacity of trustee and receiver?

A. We did, sir, for a certain length of time.

Q. You never communicated to him that his appointment was unauthorized or that his action was to be repudiated by any one member of the firm?

A. I did not.

Q. Now, you have mentioned the pecuniary condition of the firm and you have stated that your brother is insolvent?

A. Yes, sir.

Q. Has he discussed with you his private affairs so that you can swear to them of your own knowledge or information gathered from him?

A. I can only do so from what he told me in his letters.

247 Q. Have you those letters?

A. No, sir; I have not got them.

Q. Then what you are testifying to as to your knowledge of his pecuniary condition is what you have gathered from his letters?

A. I know, sir, that he has not got a cent.

Q. You know that from what he told you?

A. I know he turned over all the money he had.

Q. Did you see the conveyance?

A. No.

Q. Were you present at the time he turned it over, or are you possessed of an exact knowledge of all he did previous to the assignment?

A. I could not give it to you exactly, but I know generally.

Q. You were very intimate, so that you knew all those things?

A. We were; up to the time I left there.

Q. Were not your relations intimate and confidential afterward?

A. Not specially confidential. We had confidence in each other, as much as brothers ordinarily have.

Q. You are now testifying as to his good faith to that bank and allege that he turned over everything to the bank; was that since he was indicted, or about that time?

A. I think he did it before that.

Q. How do you know that it was turned over?

A. Because it has been sold for the benefit of the creditors.

Q. All he had?

A. Yes, sir.

Q. When were you there to learn that fact?

A. I read it in the papers.

Q. Your information is based upon what he told you and

248 what you saw in the newspapers?

A. Yes, sir; and other parties.

Q. Now, you stated in your examination by Mr. Dysart that when you made that estimate——

A. I didn't make any estimate, and I said so to Mr. Dysart.

Q. Well, you stated in your examination by him that the statement made at the time the receiver was appointed and the trust

deed was executed was based upon the January statement; is that true?

A. It was, as far as I know. I don't know how they would get it in any other way.

Q. You said farther that the January statement was a statement based upon the face value of the assets; is that true?

A. I understand that when we go to get a statement we get from the books the liabilities and assets and an invoice of stock is taken, and we call it the face value.

Q. So, when you made the statement of the condition of the firm to your brother about the first of January, showing that you had cleared about $9,000 on your business the preceding year, it was based upon the statement that all bills payable were good and that the goods were estimated at what you paid for them?

A. Yes, sir; they were invoiced at cost.

Q. You made no allowance for bad debts, no depreciation in value of stock, or any other deficiency there might be in business?

A. Well, we took the run of expenses of the concern for a year.

Q. Did you make on your estimate of the condition of the firm on the first day of January any allowance for bad debts—make any allowance for depreciation in stock or for any other
249 deficiency in your business?

A. My understanding is simply this, that the goods were taken—as a general thing when a man takes an invoice the goods are taken at their market value at the time of the invoice.

Q. Then they were not taken at their face value?

A. That is what I understand by face value.

Q. How about the accounts—did you take them at what they were worth?

A. We took them as they appeared on the ledger, except those charged to profit and loss.

Q. Then if you knew of any accounts that were bad on the first day of January they were charged off?

A. Yes, sir.

Q. You would not undertake to make a statement to your brother of the condition of the firm and include accounts or stock worth less than cost, because it would be a false statement of the condition of the firm?

A. Well, the invoice is taken at the value at the time.

Q. You wanted to get an exact knowledge of the condition of affairs?

A. Yes, sir; that was the intention.

Q. That showed that you were ahead about nine thousand dollars on the first of January preceding the failure?

A. I do not remember anything about that, sir.

Q. You heard your brother testify yesterday?

A. Yes, sir.

Q. Have you no recollection of it?

A. I gave him the statement of it, I suppose.

Q. It was correct?

A. Yes, sir; as far as I know.

Q. There was nothing fictitious or stuffed in it.

250 A. No, sir; I don't usually stuff anything.

Q. Then there was an allowance made for bad debts?

A. I presume so; like everybody else we had some.

Q. You took the invoice?

A. No, sir.

Q. Were not you the book-keeper prior to that?

A. Yes, sir; but Mr. Benedict took the invoice.

Q. You say when you made the statement to Mr. Stewart——

A. I didn't make that statement.

Q. Wait a moment. When these statements were made to Mr. Stewart and to the other gentlemen that this indebtedness to the banks was not included in the statement as part of the indebtedness of the firm of Benedict, Melone & Co., why did you think so?

A. Simply from the fact that we had no record of the accomodation paper, and had no means of knowing.

Q. Mr. Dysart called your attention to the fact as to whether the indebtedness which was not accommodation paper to the banks at Macon, amounting to twenty or twenty-five thousand dollars—as to whether that was included in the statement made at that time in your presence of the liabilities of the firm of Benedict, Melone & Co., and you stated that you thought not?

A. I said I didn't know, but I thought not.

Q. Your books do not show?

A. They do show.

Q. Did you have a memorandum on your books showing that you had received that much money from the banks at Macon City?

A. Yes, sir.

Q. Can you state on what book that appeared?

A. Yes, sir.

251 Q. What book?

A. On the journal; that is my remembrance of it, and on the bills payable book.

Q. Showing that your firm, Benedict, Melone & Co., owed the Macon banks between twenty and twenty-five thousand dollars?

A. The Macon Savings Bank; yes, sir; I think so; that is my recollection. I think if I had the books I could show it to you.

Q. Did you testify to that when this matter came up, as to the allowance of claims by the receiver?

A. Yes, sir.

Q. Don't you recollect there was no memorandum of it on the books shown at that trial?

A. I think I can show you——

Q. Just answer my question; do you remember?

A. I do, sir. I think the books showed it then.

Q. Well, if that was on your books as a liability justly owing by the firm of Benedict, Melone & Co., why wasn't it included in the statement made at the time of the appointment of a receiver, when statements were being made there by Mr. Benedict and yourself at that time that you were perfectly solvent; whereas if this indebtedness, now alleged to be justly owing, had appeared in that statement you

would have been found to be insolvent by several thousand dollars?

A. Not according to that statement we are not.

Q. Didn't you state a moment ago that this indebtedness to the banks was not included in the statement of your liabilities made at that time to Mr. Craig, Mr. Stewart, Mr. Ess, and the other gentlemen?

A. I told him I did not make that statement.

Q. Were you not aware that it was included when he asked you about it?

252 A. I said I didn't think it was.

Q. I will ask you why it was not included.

A. I don't know; I didn't make the statement.

Q. You were informed that if you were entirely solvent it was unnecessary to make this deed of trust or appoint a receiver, and finally it was only done for the purpose of protecting the property from being attached by the creditors of J. B. Melone?

A. You must remember that I stated yesterday, and I state now, and have all the way through, that I made very few statements at any time. Mr. Benedict made most of the statements there, and, perhaps, I authorized them—that is, I may by my silence — acquiesced in some of the statements, and I think I did.

Q. Didn't you know that if this indebtedness alleged to be due the banks had been carried into the statement at that time you would have been shown to be entirely solvent?

A. It would not show an insolvency.

Q. According to that statement, taking things on the basis you took them, you would have been insolvent by several thousand dollars?

A. No, sir.

Q. What was it you were owing the banks there?

A. I think we owed the Macon Savings Bank about $22,000, and the other I didn't know anything about.

Q. What was the amount due the Farmers' & Traders' Bank?

A. I told you that was all accommodation paper and I knew nothing about it.

Q. Who attended to this business; who signed the accommodation paper?

A. I did.

Q. And you knew nothing of it?

253 A. I didn't know the amount.

Q. You kept no memorandum of it?

A. I did not, because it was always protected by the parties there.

Q. You gave yourself no trouble concerning it?

A. I did not, sir.

Q. Now, then, all the legitimate debts, according to your statement in your examination by Mr. Dysart, of the two banks at Macon were not included among your liabilities on the day that Mr. Stewart was appointed assignee?

A. I have told you, sir, frequently that I told him that I had no memorandum of this accommodation paper, and that my impres-

sion was that the Macon Savings Bank paper was not put in. I may be mistaken.

Q. The question is as to the legitimate debts to the two banks; I said nothing about accommodation paper.

A. Well, if you use the word legitimate there, I will say that legitimately we didn't owe the Farmers' & Traders' Bank anything.

Q. The question of Mr. Dysart was whether the legitimate debts, in contradistinction to the accommodation debts, were put in that statement, and you stated that they were not.

A. I said the paper owing the Macon Savings Bank was not put in.

Q. Now, you had been book-keeper up to the first of January?

A. Yes, sir.

Q. You had met with no losses up to the time the receiver was appointed?

A. We had met with losses.

Q. Heavy losses?

A. No, sir.

254 Q. By whom?

A. Well, sir; I don't remember the name. It was some Texas parties.

Q. How much was it, and where do they reside?

A. Well, sir, I could not tell you without referring to the books, but there was some also in Kansas and some in Missouri.

Q. When did you first learn that they had failed?

A. Who?

Q. The Texas creditors.

A. What do you mean?

Q. I inquired what losses you had sustained between the first of January and the time the receiver was appointed, and you spoke of some. Please state what they were and when you first ascertained the loss.

A. I can't say. I presume the books will show what was charged up between the 1st of January and the 1st of February.

Q. What is your recollection?

A. My recollection is that there was probably some Texas papers and some Kansas accounts and some Missouri accounts. I don't want you to think there was anything outside of ordinary transactions.

Q. All of the debts that were lost were charged on the books at that time?

A. All that we knew of. We got advice that certain parties had failed and their account was charged up to profit and loss.

Q. Whatever losses had arisen between the 1st of January and the time the receiver was appointed the books will show, as far as you were advised?

A. Yes, sir; but there may have been losses not charged up.

Q. Now, you have undertaken to say that it was from a constraint exercised over your mind and judgment by Mr. Stewart that

255 you were compelled to make this preferment of the banks here?

A. No, sir. I don't undertake to say anything of the kind. I mean to say, sir, that from all the circumstances I did what I thought was best at the time.

Q. You are generally able to do your own thinking, then?

A. I do usually do it, whether able or not.

Q. So, neither Mr. Stewart nor Karnes and Ess, nor Mr. Craig, nor Mr. Stonestreet, nor any other person at that time impelled you against your judgment to do this thing?

A. No, sir; at that time I did what I thought was best. I thought so at the time, though I wouldn't do it now; if I had to go over it again I wouldn't prefer anybody.

Q. Did you mention to your attorneys or to Mr. Karnes or Mr. Ess or Mr. Stonestreet or Mr. Stewart this request made by your brother?

A. I did not, sir. I stated that plainly yesterday.

Q. Did you state to them when you preferred the banks here that the banks at Macon should be preferred?

A. I did not.

Q. Yet you knew your brother had been involved in that bank?

A. Yes, sir.

Q. And you never intimated to them that you were owing that bank any sum of money which should be preferred?

A. I don't think I asked them to prefer any bank.

Q. Now, the bank of Kansas City was not asking to be preferred by any officer, agent, or attorney?

A. They didn't ask me.

Q. It was a voluntary proceeding on your part?

A. Yes, sir; as far as I am concerned.

256 Q. How many letters do you think you wrote your brother after the appointment of the receiver?

A. During the whole time?

Q. Yes, sir; from the time the receiver was appointed till the time you went to Macon.

A. I have not been back since the failure.

Q. Well, to the time he came here?

A. I have no idea, sir, how many letters passed, but very few, though; what I would consider very few: there may have been half a dozen or a dozen, or there may not have been so many. I don't know of more than two, but there may have been as many as a dozen.

Q. What course did your brother advise you to pursue in his letter to you with reference to this matter?

A. He did not advise me to pursue any course; the only thing I remember of specially, except those two letters, he wrote me a letter once after the sale had been made here—that is, after the goods had been disposed of. I suppose it must have been just prior to the distribution of the 35 per cent., or whatever it was, when Mr. Stewart was around on 6th street. He wrote me a letter and asked me to give him a statement of the amount the goods brought, and the amount of collections that had been made. As an interested party, he said he thought he ought to have it.

Q. Did you state to him then the amount of these preferences, or was that done before?

A. As far as I know, he had it before.

Q. When you borrowed this money from the banks here, did you not represent that you were owing the banks nothing at Macon City, except the $25,000?

257 A. I don't know, sir, that I ever did.

Q. Did any person of your firm make any such showing?

A. I don't know whether they did or not; not to my knowledge.

Q. You borrowed some $16,500 from the banks here, and you claim now——

A. More than that, I guess. Over $19,000 was preferred.

Q. Well, you had also borrowed between twenty and $25,000 from the banks in Macon?

A. We borrowed from one bank there.

Q. The banks here had no knowledge or intimation of that?

A. I don't know whether they did or not.

Q. Don't you know they did not?

A. I don't know; if they had they didn't get it from me.

Q. Don't you know perfectly well that they would not have loaned you a dollar had they known it?

A. I don't know.

Q. Don't you know that money was loaned to you on the basis that you were owing only nominal debts—your commercial debts—to these banks here?

A. I don't know, sir.

Q. You were the book-keeper of the concern previous to the 1st of January?

A. Yes, sir.

Q. You had executed the accommodation paper at the Farmers' & Traders' Bank at Macon?

A. No, sir; I did not.

Q. Who did?

A. Nobody that I know of.

Q. What bank was it that the accommodation paper was for?

258 A. It wasn't for any bank; it was a coal bank; it was to a coal company. It was executed for the Missouri Coal and Mining Company, and was negotiated at the Farmers' & Traders' Bank, if you want to get at the facts.

Q. It was held by that bank?

A. I think so; I don't know much about it.

Signature waived.

Sworn to before me on the day, at the place, and between the hours first aforesaid, but by consent of counsel for complainants and respondents the signature of said witness was waived.

[SEAL.] JULIUS C. HUGHES,
Notary Public.

Not being able to continue the further taking of these depositions on this day by reason of the absence of witnesses, by consent of coun-

sel I adjourn the same, to be again continued at 3 o'clock p. m. on Monday, February 18th, 1884, at the same place.

[SEAL.] JULIUS C. HUGHES,
Notary Public.

Pursuant to adjournment, as above stated, on the 18th day of February, 1884, at 3 o'clock p. m., I continued the further hearing of said depositions, as follows, to wit:

CHARLES H. BENEDICT, of lawful age, being by me cautioned and sworn to testify the whole truth, and carefully examined on the part of the complainants, deposeth and saith:

Direct examination by Mr. DYSART:

Q. State your age and residence.

A. I am about 41 years of age, and I reside in Kansas City,
259 Missouri.

Q. Where did you reside in February, 1882?

A. In Kansas City.

Q. You were a member of the firm of Benedict, Melone & Co.?

A. Yes, sir.

Q. Where did they do business?

A. We did business at 304 Delaware St., Kansas City, Missouri.

Q. Give the names of the members of that firm.

A. The firm was composed of J. B. Melone, R. A. Melone, & C. H. Benedict.

Q. What was the style of the firm?

A. Benedict, Melone & Co.

Q. How long did that firm do business in Kansas City—from what date to what date?

A. About two years. From January, 1880, until February 16th, 1882.

Q. Did you cease to do business on the last-mentioned date?

A. Yes, sir.

Q. You may state what the firm did on that day with reference to its business and property.

A. On the 16th of February you refer to?

Q. Yes.

A. Well, sir, you want to know everything that happened at that date as well as I can give it?

Q. No; in a general way. If you made any disposition of your property you may state how.

Objected to as incompetent unless the specific acts are detailed.

Mr. DYSART: We will withdraw the question.

Q. Where did J. B. Melone reside at that time?

A. At Macon, Missouri.

260 Q. If your firm received a message from J. B. Melone on that day, February 16th, 1882, state in what manner you received it.

A. Yes, sir; we received a letter from J. B. Melone that morning.

It was sent here by Orr Saunders. I think he left Macon the night before on the 12 o'clock train and got up here about half past eight o'clock in the morning. I don't know where he met him at, but Mr. Melone received the letter and opened and read it.

Q. You mean R. A. Melone?

A. Yes, sir. I was not very well that morning and I was late getting to the store, and he started up to my house to see me and he met me on the corner of 4th street and showed me the letter, handed it to me, and I read it and handed it back to him; possibly I don't know what he did with it. It went on to state——

Q. Wait a moment. Do you know where that letter is?

A. I do not.

Q. What did you do with it when you read it?

A. It is my impression that I handed it back to R. A. Melone.

Q. Have you seen the letter since?

A. I have not.

Q. Do you know anything about its whereabouts?

A. No, sir; I do not.

Q. Is it in your possession?

A. It is not.

Q. You may now give the contents of that letter, as nearly as you can; give the exact language, if you can remember it, and, if you cannot, then as nearly as you can.

A. I cannot do that. The letter was addressed to Benedict, Melone & Co., and signed by James B. Melone, and it went on to say that their bank, the Macon City Savings Bank, had made an
261 assignment, and that it would become necessary for us to do something of the same kind here, and he suggested Charley Stewart as a proper person to act as assignee—well, I don't know as he said—yes, as I said before, he stated that it would be necessary for us to make an assignment. I know that is the word he used, and that Charley Stewart would be a proper person to act in that capacity; and I am under the impression that he asked us, if possible, to make the Macon Savings Bank a preferred creditor. Mr. Melone stated that the other day, and I have been studying about it since, and I think those are the words of the letter; that is the purport of the letter; it was not very long.

Q. Since hearing J. B. Melone testify you think that item was in it about making the Macon Savings Bank a preferred creditor if it could be done?

A. Yes, sir. I have been studying about it a good deal since, and I am under the impression that that was in the letter.

Q. What time did you receive that letter?

A. About half past eight o'clock; maybe nine o'clock.

Q. Now, Mr. Benedict, state in detail and as accurately and as perfectly as you can just what you did after receiving that letter.

A. Well, sir, I went right down to the store and had a consultation with Mr. Melone there as to what we had better do—Mr. R. A. Melone, I mean; and he said he would go out and get Charley Stewart and consult about the matter, and he went for Mr. Stewart and brought him in; and we met down at lawyer Craig's office, and

I told Mr. Craig what we wanted to do; that we had to wind up our affairs here and we wanted to do it in some shape, so as to
262 prevent any attachments on it, and so it could be wound up right. We talked about the matter for some time, and Mr. Stewart suggested that he wanted to see Karnes & Ess; that they were his lawyers, and, of course, we had no objection to that; and I think while we were talking there he suggested—I think, however, Mr. Wilson, vice president of the Kansas City Savings Association, was in there at the time. We were owing him some money and he was pushing his claim, or wanting it protected; and we talked about the matter there for a long time, and Mr. Stewart said he insisted on our making the Kansas City Savings Association a preferred creditor, and I told him if we made him a preferred creditor we would prefer the balance of them, treat all alike—the Bank of Kansas City and the Citizens' National Bank also.

Q. You mean all the banks in Kansas City that you were owing?

A. Yes, sir; and it was finally decided that we should do that; and I think we then came down to Karnes & Ess' office and fixed up the paper there.

Q. At Karnes & Ess' office?

A. Yes, sir; though possibly Mr. Craig may have written up the deed of trust at his office. I don't know.

Q. State if Mr. Stewart made any conditions as to serving as assignee; if so, what they were.

A. I think he did. I think he stated that he would not serve unless we preferred the banks here; that is my recollection about it.

Q. You may state who was your attorney—the attorney of the firm.

A. Mr. Henry Craig.

Q. Now, when you started to his office, for what purpose did you go there—you and your partner, R. A. Melone?

263 A. Well, I went there to make an assignment; that was my idea, to make a straight, square assignment.

Q. As directed by J. B. Melone?

Objected to as leading.

A. Well, I don't know that it was because it was directed by him, but that was my idea. I did not think of preferring anybody when I went there; that was an after consideration.

Q. State when it was first suggested that one or more of the Kansas City banks should be preferred.

A. It was suggested there that morning in Mr. Craig's office.

Q. Who was present?

A. Mr. Melone, Mr. Stewart, Mr. Craig, and I don't know of anybody else. I don't know whether Mr. Ess had been there then or not.

Q. You spoke of Mr. Wilson?

A. I think possibly he was there.

Q. Now, when and where was it that you agreed that the three banks at Kansas City should be preferred?

A. Well, I think we agreed on it right there in Craig's office. I think that is the place.

Q. Did Mr. Stewart make any other condition of his serving as to attorneys?

A. No, sir; I don't know that he did. Nothing you could call conditions.

Q. What firm did he mention, if any, as his attorneys?

A. He mentioned Karnes & Ess as his attorneys.

Q. I understood you to say that Mr. Ess came into Craig's office while you were talking about the matter?

A. I am under the impression that he did.

Q. Where did you go, then, from Craig's office, and who went along?

264 A. We all went up to Messrs. Karnes & Ess' office after that.

Q. About what time in the day was that?

A. Well, I can't exactly say, but I am under the impression that it was before noon—about ten o'clock. We did a good deal of talking there in Craig's office, and we went up to Karnes & Ess' office after that.

Q. State what representatives were there—I mean at Karnes & Ess' office—of those respondent banks, the three preferred banks?

A. Mr. Wilson, of the Kansas City Savings Association, he was there; and while we were up there Mr. Whipple, of the Citizens' National Bank, came up and spoke to me, and I just told him he need not exercise himself about it; that his claim would be protected with the balance of them, and he went down and I didn't see anything more of him.

Q. Was there anybody there representing the other bank?

A. I don't think there was. I don't recollect anybody being there from the Bank of Kansas City. I can't recollect anybody being there at all. If there was I have forgotten it.

Q. Now, you may state what your final conclusion was.

A. Our final conclusion was to make these three banks preferred creditors and pay them off in full, dollar for dollar, and the balance of the assets of the business to go to the creditors *pro rata*, and if there was anything left after they were paid it was to go back to Benedict, Melone & Co.

Q. Now, you may state if you or any member of your firm directed how it should be done, or did you take counsel how it should be done?

A. Why, I suppose so. We talked about it there enough. That was the understanding.

Q. You and your partners not being lawyers, you didn't

265 know how to do it?

A. We didn't know how to draw up the papers, of course; there was lawyers there for that purpose.

Q. You came to the conclusion of what you wanted done?

A. Yes, sir; just exactly what I have stated, and I suppose that was done.

Q. To whom did you commit the execution of your purpose?

A. Well, Mr. Craig and Mr. Ess. I think Mr. Craig was up there—that is, I know he was.

Q. My question awhile ago was, Did you tell them how to do it or leave it to them?

A. Why, certainly, we didn't tell them how to do it. We considered the matter and come to a conclusion what we wanted done, and they did it.

Q. Now, state what was said there in reference to the mode or method of carrying your purpose into effect, if anything.

A. Well, the idea was to make a deed of trust to secure the banks and pay them off and then appoint a receiver for the balance. That was the idea; just like I told you in the first place.

Q. Who suggested that plan?

A. I could not say who suggested it. Possibly it might have been Mr. Craig and possibly Mr. Ess, but that was the idea.

Q. What, if anything, was said about an assignment?

A. Well, the parties told us we could not make an assignment from the fact that we had to have J. B. Melone's signature, and that could not be got here before the next day, and we were fearful that some one would run attachments on the concern before that time.

Q. Was that the only reason that an assignment was not made?

266 A. Well, after considering the matter it was spoken about—an assignment, understand me, was spoken about—but some one said it could not be done on that ground, because J. B. Melone was not here.

Q. Was any other reason given why an assignment was not made?

A. No; I don't know that there was. That part was not talked about much, because we concluded what to do exactly.

Q. Was anything said about an assignment in connection with securing these parties, the Kansas City banks; and, if so, what was said?

A. I don't remember that there was.

Q. You may state if you were informed on that occasion that these banks could not be secured by a deed of assignment.

A. I think I was. I think we were informed that the only mode or process was to do just as we did do. The only route we had to travel over was the one we took in order to secure the Kansas City banks and distribute the money *pro rata*—the balance of it.

Q. Then the main reason for not making an assignment, or one of the reasons, was that you could not prefer these Kansas City banks by a deed of assignment?

Objected to as leading.

A. Well, after we come to the conclusion to prefer these banks we didn't want to make an assignment, I don't suppose. We wanted to do just like we did do.

Q. Now, you may state what was done as a matter of fact; what course was taken.

A. There was a deed of trust executed to secure these banks, and Mr. Stewart was appointed trustee in the deed of trust, and then he

was appointed receiver for the balance, to receive the money and pay it out and wind up the business.

Q. Was both proceedings determined upon at the same time?

267 A. I think so.

Q. By these two proceedings you disposed of your property?

Objected to as leading.

A. Yes, sir.

Q. By these two proceedings what disposition of the property of the firm was intended to be made?

Objected to as leading.

A. Why, it was intended to wind up the business, pay off these three banks, and then pay the balance of the creditors after paying these three banks; that was the intention, and nothing else in the world.

Q. State which instrument was drawn first—the deed of trust or the petition to appoint Mr. Stewart receiver.

A. Well, I suppose the deed of trust—I couldn't say; I wasn't paying much attention to what paper was drawn up first that day, and I could not tell about that to save my life.

Q. State if both were agreed upon before either was drawn.

Objected to as leading.

A. I suppose they were, sir; I suppose we agreed on the line of action before we went to work.

Q. You may state whether or not the receivership was agreed upon before R. A. Melone signed the deed of trust.

Objected to as leading.

A. Well, sir, I could not say as to that; I don't call to mind now when he did sign it really.

Q. State, if you know, who drew the petition for the dissolution of the firm and the appointing of a receiver.

A. It has always been my impression that Mr. Ess did, but I don't know whether he did or not; I couldn't say to save me.

Q. When you directed or when you told the attorneys what you had agreed upon, state if you remained there and superintended it or went away.

268 A. Well, I was around there pretty nearly all day, I think.

Q. In and out?

A. Yes, sir; I was up to the store awhile, and then I went back.

Q. What time in the day were these instruments finished—the deed of trust and the petition for dissolution and the appointment of a receiver?

A. I think it must have been nearly night, sir.

Q. To whom was the deed of trust delivered; what was done with it?

A. I could not say; I was told——

Q. By any of the parties there?

A. Well, I think Mr. Melone told me that Mr. Wilson and Mr. Stewart took it to be recorded that evening. I don't know of my own knowledge whether they did or not.

Q. He told you so when?

A. About that time—the same day or the next day.

Q. State, if you know, what was done with the petition.

A. No, sir; I don't.

Q. Did you not sign the petition?

A. I think I did, sir.

Q. State whether it was before or after business hours.

A. Well, sir, I can't remember what time in the day it was.

Q. What was done with the petition?

A. Well, I don't know, I am sure.

Q. Did you learn from the parties at the time, the attorneys or any of them, from what they said, — they did with it or were going to do with it?

A. If *they* did I have forgotten it; I cannot call to mind now what was done with it.

Q. Do you know which judge appointed the receiver?

A. Judge Gill, I think.

269 Q. When and where did he appoint the receiver?

A. I am only under the impression that it was at his house.

Q. At his private residence?

A. Yes, sir.

Q. Do you remember who took it to him; if so, who carried it away from the office there?

A. No, sir; I do not.

Q. It was your purpose and desire, was it, Mr. Benedict, to secure the banks; that was your purpose?

A. Yes, sir.

Q. Why was it your purpose and desire to secure the banks—that is, the respondent banks? If you remember any reason now you may give it.

A. Well, I was right here at home and I felt like securing them, I suppose, and another thing was there was a little pressure to secure them. Mr. Wilson said if we did not secure his bank he would run attachments right away, or intimated as much to me. Mr. Stewart intimated that he would not serve if we did not secure his bank, and I thought if we secured one we might as well secure all.

Q. You have stated that to effectuate your purpose you made a deed of trust and filed a petition for a receiver. You may state in that connection if you would have taken either one of these steps without the other—that is to say, would you have made the deed of trust without having the receiver appointed?

Objected to as leading.

A. No, sir; I don't know as we would; that would have accomplished only half of the purpose to have done that.

Q. You may state what further business your firm of Benedict, Melone & Co. did after that time.

A. They never done any.

270 Q. If you had any further connection with the firm business you may state in what capacity.

A. I stayed right there and helped to wind the business up until the thing was closed out—that is, selling goods.

Q. In what capacity?

A. In the capacity of a salesman. I was hired to stay there and assist in selling out the goods.

Q. At a salary?

A. Yes, sir.

Q. Now, if there were any representations made at the time of the making of the deed of trust and filing the petition for a receiver as to the solvency of the firm, you may state what they were.

A. Well, the parties asked me if I thought we would pay out, and I told them yes, I thought so, and I did think so.

Q. You were honest in that?

A. Yes, sir; that is one reason why I did not object to preferring the banks, because I thought there would be plenty of money to pay them all. The banks might get their money a little quicker, but I thought there would be plenty to pay them all. That was my idea about it.

Q. Now, you may state if there was any account rendered or any exhibition or examination of the books of the firm on that day.

A. No, sir; not a bit in the world. We had no time for anything of that kind. It was a pretty big job on hand, as it was, for one day.

Q. You may state if there was any account stated or called for by any of the parties interested, any creditors.

A. Not that I am aware of; none of the gentlemen called upon me for any.

271 Q. You may state if you knew the condition of the firm at that time.

A. Yes, sir; as near as anybody could know its condition. I thought the firm's condition was all right. We never had had any trouble in meeting our obligations. We always had done that, and if it had not been for the bank failure we would yet, I suppose.

Q. You may state if your estimate of the firm's condition at that time has proved to be correct or incorrect.

A. Well, I don't know how to answer that, hardly. Of course, it didn't pay out. Some people never do that after they get in litigation. I mean to say that concerns in the condition ours was never do pay out, as a general thing, after they get into litigation.

Q. As a matter of fact, it will not pay exceeding fifty cents on the dollar?

A. No, sir; I suppose not.

Q. You may state if there were any liabilities that you did not estimate at that time or did not know of.

A. Yes, sir; there was about eight or ten thousand dollars that I did not estimate.

Q. What was the character of that?

A. Paper held by the Farmers' & Traders' Bank.

Q. What was the character of the liability; legitimate or otherwise?

A. No, sir; it is not legitimate.

Q. Well, state its character.

A. Well, sir, they are acceptances given by Benedict, Melone & Co.

Q. What is the name of them, in commercial language?

A. Accommodation acceptances.

Q. To what extent was that character of liabilities out?

272 A. Well, to that particular bank, I think about nine or ten thousand dollars.

Q. You may state if your firm has any other property that did not go into this arrangement.

A. No, sir; everything there was went into the hands of the trustee and receiver.

Q. You may state now who was appointed trustee and also receiver.

A. Charles Stewart.

Q. Do you know whether he sold the property of the firm as receiver or trustee?

Objected to by counsel for respondents as incompetent and immaterial.

A. I suppose he sold it as receiver.

Q. You may state your condition as to solvency since the 16th day of February, 1882.

A. Well, I have been pretty badly wrecked.

Q. You may state if you are solvent or not.

A. No, sir; I have nothing.

Q. No property that an execution can reach?

A. No, sir; not a dollar on earth.

Q. What do you know about the solvency of J. B. and R. A. Melone?

A. I don't know; I think they are in the same condition.

Q. Do you know of their having any property?

A. I don't know.

Q. You may state whether the failure of the Macon Savings Bank was known here that morning to the parties interested.

A. Yes, sir; I expect it was known here by 9 o'clock.

Q. Was it known to the representatives of these banks at the time the deed of trust was executed?

Objected to as leading.

273 A. Yes, sir.

Q. What information, if any, did they have of the contents of this letter received from J. B. Melone?

A. Who do you mean?

Q. The representatives of these respondent banks?

A. They did not know anything about its contents, but they got

the news by telegraph. A dispatch was sent here to Dun's Commercial Agency early that morning that the Macon Savings Bank and the Farmers' & Traders' Bank had failed. Mr. Frith, of course, notified the banks right away, and it was known on the streets by 9 o'clock.

Q. Now, was the fact of that failure talked of while these proceedings were progressing?

A. O, yes; I suppose so.

Q. What reference was made to it by any of the parties present on that occasion?

A. O, I don't recollect now what was said; it was talked about in a general way.

Q. You may state what Mr. Wilson said on that day, if anything, with regard to the failure of the Macon Savings Bank or what he desired.

A. He told me that he wanted his claim secured and intimated that if it was not secured he would run attachments on the store.

Q. What was said, if anything, about the liability of your firm to the Macon Savings Bank?

A. I don't know that there was anything said about that at the time; I don't recollect whether there was or not.

Cross-examination by Mr. Ess:

Q. What is the name of the attorney who has been ex-
274 amining you in this case?

A. Mr. Dysart.

Q. What is his given name?

A. B. R. Dysart.

Q. How long have you known Mr. Dysart?

A. Well, I have known Mr. Dysart since about—I don't know, sir; it is a long time; ten or fifteen years; maybe longer than that.

Q. Where does he live?

A. In Macon, Missouri.

Q. Where did you live prior to coming to Kansas City?

A. Macon, Missouri.

Q. How long have you known R. A. and James B. Melone?

A. I have known them since 1864 or 1865.

Q. Were they in business before you came here?

A. Yes, sir.

Q. What business?

A. Manufacturing tobacco.

Q. Were you ever in business with R. A. or James B. Melone?

A. Yes, sir.

Q. Where?

A. In Macon, Missouri.

Q. How long and with which one of the Melones?

A. Several years with R. A. Melone.

Q. What was your business in Kansas City?

A. Wholesale groceries.

Q. When did you begin it?

A. I began it about January 1, 1880.

Q. Who were the partners then?

A. James B. Melone, R. A. Melone, and C. H. Benedict.

Q. How much capital did James B. Melone have in the business?

A. James B. and R. A. Melone had five thousand dollars.

275 I bought out Mr. Krausse, and paid him five thousand dollars for his interest, having five thousand dollars interest before that, making my interest ten thousand dollars and the whole amount fifteen thousand dollars.

Q. How is that?

A. I say I had five thousand dollars, J. B. and R. A. Melone twenty-five hundred each, and then I bought Krausse out and paid him five thousand dollars for his interest, which made the entire capital fifteen thousand dollars.

Q. Now, when was the first intimation you had of the failure of the Macon banks?

A. On the morning of the 16th of February, 1882.

Q. Did you see it in the papers?

A. No, sir; I received a letter from J. B. Melone.

Q. You got that letter on the corner of 4th and Delaware streets, in this city?

A. 4th and Wyandotte; I met Mr. Melone there.

Q. You were living here at that time?

A. Yes, sir.

Q. R. A. Melone was living here at that time?

A. Yes, sir.

Q. Did James B. Melone live here, too?

A. No, sir.

Q. How often was he here to look after the business during the two years you were carrying on, as near as you can remember?

A. Three or four times, I suppose.

Q. Who conducted the business here?

A. Mr. Melone and myself.

Q. What portion of the business did you look after?

A. Well, I looked after the buying and he looked after the general run of the business. Mr. Melone kept the books; that

276 was his business.

Q. Who looked after the making of notes, sending remittances, and keeping the accounts?

A. Mr. Melone.

Q. Now, you say you received this letter from J. B. Melone on the morning of the 16th of February, 1882?

A. Yes, sir; the morning that we made the assignment.

Q. You read that letter?

A. Yes, sir.

Q. Did that tell you you must make an assignment?

A. No, sir; it did not say we must make an assignment. It said that the bank had made an assignment, and it would probably be necessary for us to do something of the kind here, and suggested Mr. Stewart as a suitable person to act in that capacity.

Q. Then the letter stated that it would probably be necessary to do something here?

A. Well, I don't know that the word probably was in there, but I don't think it said we must make an assignment; there was nothing mandatory in it.

Q. This letter was simply advisory, then?

A. Yes, sir; that is all.

Q. Now, have you ever looked for that letter?

A. No, sir; I have never looked for it.

Q. How long did you keep it?

A. I kept it a minute and a half, I reckon—only long enough to read it.

Q. Then you handed it back?

A. Yes, sir; that is my impression.

Q. You are not certain about that?

A. I am positive I did, because I never had the letter or saw it from that time to this.

277 Q. You have been asked a great deal about that letter from that time to this?

A. I don't remember that I have been asked much about it until the other day here.

Q. During the day of the 16th of February, 1882, did you or did Melone, in your presence, say anything to Craig, Ess, or Wilson about the contents of that letter?

A. I don't know that I did.

Q. When was the first time that you formed the acquaintance of Ess?

A. I never saw the gentleman until I met him there in Craig's office.

Q. Who introduced him to you?

A. I could not say who did.

Q. Was R. A. Melone present at the time?

A. I expect he was.

Q. What was done at that time in Craig's office?

A. Well, sir, we talked about the matter, and I told Mr. Craig the condition of affairs, and that we wanted it put into shape to wind it up in the best way possible.

Q. Don't you remember that they made an estimate there that the assets of the firm would be about eighteen to twenty thousand dollars above all liabilities?

A. No; I don't recollect about that, sir.

Q. Do you recollect whether that matter was discussed in Craig's office?

A. No, sir; I do not.

Q. How long did the parties remain in Craig's office until they went to the office of Karnes & Ess?

A. I could not say how long it was, but I know it was not 278 a great while.

Q. It was not more than fifteen minutes, was it?

A. I could not say, sir, how long it was. I think it was a longer time than that, though.

Q. Was Ess in Craig's office when you first went there?

A. No, sir; he was not there when I first went there.

Q. Was Stewart there when you first went there?

A. Well, I could not say whether Mr. Stewart was there or not. He was there, but whether he came in after I did I can't say.

Q. Don't you remember that he came in afterward; that you were late in getting down that day, and that R. A. Melone went after Stewart?

A. Well, I was down in town before Mr. Melone went for Mr. Stewart.

Q. But you had not seen the letter——

A. I had seen the letter before Mr. Melone went after Mr. Stewart.

Q. Can you tell how long before?

A. Well, I saw the letter when I came down-town that morning, a little after 8 o'clock, about the time the train got in. Mr. Saunders got off the train here at the bridge depot and came right up to the store with it. I do not think it could have been later than half past eight o'clock when Mr. Melone met me. I was not a great deal behind time that morning.

Q. It was about half past eight o'clock.

A. I think so. It might have been eight o'clock, possibly. I know after that he went out after Mr. Stewart.

Q. You had not then seen Mr. Craig when R. A. Melone handed you the letter from James B. Melone?

A. No, sir; I had not seen him; nobody had any intimation of such a thing then.

Q. That was somewhere between eight and nine o'clock.

279 A. I think so.

Q. While you were at Craig's office did you give any instructions to Craig to draw up a voluntary assignment?

A. I don't remember that I did. I had no directions to give to do anything, I don't think, until we came to some conclusion what we ought to do.

Q. Who was Ess acting for when he was in Craig's office that morning?

A. Well, I suppose, if he was there acting for anybody, he was acting for Stewart. Mr. Stewart remarked that Karnes & Ess was his lawyers and he wanted to see them.

Q. Don't you know that Ess was acting as attorney for the Kansas City Savings Association?

A. No, sir; I did not know it then and I don't know it yet, for that matter.

Q. Did you know that Karnes & Ess never had been attorneys for the Bank of Kansas City or the Citizens' National Bank?

A. No, sir; I didn't know that.

Q. Who went with you up to the office of Karnes & Ess?

A. Well, as near as I can recollect, Mr. Melone and Mr. Craig was there. I don't know whether they all went together or not, but they all met there, at any rate.

Q. And then the first thing after we got up there was to draw up this deed of trust, wasn't it?

A. Well, I don't know what was the first thing done after we got up there.

Q. Don't you remember that we started to draw the deed of trust and that Ess went out to the Bank of Kansas City to get their papers, and to the Kansas City Savings Association and got their papers, and returned with them and Mr. Craig was drawing the deed of trust?

280 A. Possibly.

Q. Don't you remember that after we had got the deed of trust drawn up Mr. Whipple or Mr. Cooper, of the Citizens' National Bank, came up with fifteen hundred dollars of paper held by the Citizens' National Bank and wanted that inserted in the deed of trust?

A. I don't know whether Mr. Cooper was there or not. I know I saw Mr. Whipple up there. I think it was Mr. Whipple; it might have been Mr. Cooper, however.

Q. That was about noon, wasn't it?

A. It may have been; I could not say.

Q. Then don't you know that another deed of trust was drawn up so as to embrace that paper, making about fifteen hundred dollars in amount?

A. No, sir; I didn't know there was another. I supposed they were put in together.

Q. Of course; but the Citizens' National Bank was not in the first deed of trust as we proposed to draw it?

A. I don't know.

Q. Don't you know that the debt of the Citizens' National Bank had been entirely forgotten until Whipple or Cooper came up, whichever it was?

A. No; I don't. If it was I have forgotten it. I know I told Mr. Whipple or Mr. Cooper when he came up that his claim would be protected.

Q. And then it was put into the deed of trust?

A. I suppose it was; yes, sir.

Q. That is, you intended it should be?

A. Yes, sir.

Q. Now, did you tell Craig or Ess to draw up a deed of trust securing these banks?

281 A. Why, I suppose so. We talked about it, and that is the conclusion we come to.

Q. Who acted for you in the trial of this proceeding?

A. Mr. Craig, I suppose.

Q. But when it came to the proceedings to wind up the business of the copartnership who acted for you as plaintiff in that suit?

A. Well, I never had anything to do in the matter with Mr. Craig at all after that date. When I had any questions to ask or wanted any advice I went to Karnes & Ess. I used to look upon them as much my lawers as Stewart's or anybody's else. That's the fact about it.

Q. Don't you know that we were inquiring there after the deed

of trust was drawn as to what the nature of the partnership was, whether you had written articles or not?

A. Yes, sir; I believe so.

Q. Don't you know we inquired whether the partnership was formed for any definite length of time?

A. Yes, sir.

Q. What was the partnership with reference to time?

A. There was no definite time fixed.

Q. Don't you know that inquiries were made there by Craig and Ess as to the amount of your assets over and above all liabilities?

A. There might have been; I do not recollect it now.

Q. Well, don't you remember, Mr. Benedict, that you complained——

A. I expect there was, from the fact that I thought the thing would pay out all right at the time.

Q. And that you would have a large surplus left for division among the partners?

A. Well, I don't recollect what was said about that, but I
282 thought there would be plenty to pay off everybody and we would have something left.

Q. Wasn't it about eighteen or twenty thousand dollars you would have as an overplus?

A. I could not say as to that.

Q. Don't you remember that was the amount estimated there by yourself and Mr. Melone?

A. No; I did not. If anybody made an estimate it must have been Melone, because I didn't make any that I remember of.

Q. Then, you intended to make a deed of trust securing the three banks here?

A. Yes, sir; and that is what we done, I believe.

Q. Don't you remember that one reason why an assignment was not made was because you wanted an account taken between the partners and Jim Melone's interest ascertained and paid to him?

A. I don't recollect anything about that at all.

Q. Don't you remember that we discussed the propriety of going ahead with the business and not having any receiver or making any assignment at all, but ascertain his interest and pay it off?

A. O, yes; that was talked about.

Q. There was no doubt entertained by anybody at that time that every creditor would be paid in full?

A. No, sir; that was the idea.

Q. Don't you remember that one of the reasons for the receivership was a desire to ascertain what J. B. Melone's interest was so as to pay it to him?

A. Well, I don't know that that was a reason at all.

Q. Now, you have spoken in your direct examination about some fears of attachment?

A. Yes, sir.

283 Q. Were not the fears of attachment from the creditors of the Macon banks and not from the creditors of Benedict, Melone & Co.?

A. No, sir; fears of attachment by parties right here at home. Mr. Wilson, for one.

Q. Did he threaten to attach?

A. He intimated that he would attach.

Q. Didn't you at that time, both of you, have fears that the creditors of the banks at Macon would sue James B. Melone by attachment and attach his interest in the stock here, and thereby cause you trouble?

A. Yes, sir.

Q. Was that not the reason and the purpose of the receivership, that you might ascertain what his interest was and pay it into court, that they might go and get it if they wanted it?

A. We concluded that was the best way to wind up the business, by having a receiver appointed.

Q. You wanted a receiver and intended to have a receiver appointed, then?

A. Yes, sir; I think so.

Q. Now, what time in the day was it when the receivership was agreed upon?

A. I could not tell you, Mr. Ess, what time it was.

Q. Can you tell who acted for you in the receivership business?

A. I could not say.

Q. Don't you know that there was a suit brought in the name of Charles H. Benedict, plaintiff, against Richard A. Melone and James B. Melone, defendants?

A. Yes, sir.

Q. Don't you know who acted as attorney for you in that case?

A. I think Craig did. I could not say to save my life now.

284 Q. Don't you remember this: That after the deed of trust had been made and Mr. Stewart had got it that Ess told you he would have to go and see the bank and get their consent to his acting for you in this matter?

A. I believe that is the fact; yes, sir.

Q. And that Ess returned from the bank——

A. That is what I told you a minute ago; that I had always looked upon Ess as our attorney, all the way through, more than Craig, because I hadn't anything to do with Craig after that morning.

Q. Then, do you remember Ess leaving the office of Karnes & Ess to see the Kansas City Savings Association and get their consent to act further in the matter?

A. Yes, sir.

Q. Then we returned to the office of Karnes & Ess and were in the back room, were we not?

A. I don't recollect.

Q. Or the middle room?

A. I don't recollect which room we were in.

Q. Don't you recollect that we discussed then the matter of the power or authority of the members of the firm here to make an assignment, James B. Melone not being here?

A. That was discussed. I could not say whether there or over at Craig's office.

Q. Was not that matter discussed, and did not Craig and myself look up authorities after I had gone to see Wilson and got his consent to act in your interest and returned?

A. What is the question?

Q. Do you recollect whether the matter of your power or authority to make an assignment here in the absence of James B. Me-
285 lone was discussed after I had seen Wilson and got his consent to act in your interest?

A. I could not say when it was. I know we talked of that matter some time.

Q. And the conclusion reached was that the assignment would have to be sent to Macon City to be signed by James B. Melone?

A. Yes, sir.

Q. You do not now recollect who it was that drew the petition for the appointment of a receiver, do you?

A. No, sir; I do not.

Q. Do you remember that Ess drew that petition for you as plaintiff?

A. I think he did; yes, sir.

Q. Don't you remember that the purpose was to ascertain the amount that was coming to each partner and pay off all the debts?

A. Well, the purpose of the whole business was, just as I have tried to state it, to secure the banks and pay them in full, and the purpose of the receiver, as I understand it, was to pay the balance of the creditors *pro rata*.

Q. Didn't you then suppose they would be paid in full and a large surplus be left?

A. Yes, sir.

Q. You knew that James B. Melone was an officer of the Macon Savings Bank?

A. Yes, sir.

Q. You knew that that bank had failed?

A. Yes, sir.

Q. You knew there would probably be suits against him as an officer of the bank, under the Missouri statutes?

A. Yes, sir.

Q. So his interest in this firm, whatever it might be, in
286 order to protect the firm, would have to be ascertained, taken out, and paid over in some way?

A. I suppose so.

Q. The matter of continuing your business was discussed and you concluded that it could not be continued here for the reason that the interest of James B. Melone had to be taken out?

A. I never had any idea of continuing after I heard of the failure of the Macon Savings Bank, and we went down that morning with a view of closing out the business entirely, and I think we did so.

Q. You expected, though, to receive something from your capital that had been invested in the business here?

A. Yes, sir; I think so.

Q. And you supposed R. A. Melone would have something coming to him from the business here after all the debts were paid?

A. Yes, sir.

Q. Did you not expect at that time, you and R. A. Melone, that you would go on in the business afterward here with the capital you expected to get out of the firm?

A. Well, if the thing had panned out as we thought it would we probably would have done so.

Q. Was that spoken of at any time prior to the execution of the deed of trust, that you might want to go on in business there, and might want accommodation from these banks?

A. It might have been, possibly.

Q. Don't you remember that it was?

A. I expect it was.

Q. During the time you were in the office of Mr. Craig, on the 16th of February, 1882, and during the day, while you were in the office of Karnes & Ess, did you see any representative of
287 the Bank of Kansas City?

A. I don't think I did.

Q. Did you see any representative of the Citizens' National Bank except Whipple or Cooper?

A. No, sir.

Q. Did you see any representative of the Kansas City Savings Association except Ess, the attorney, and Wilson, the vice-president?

A. That is all.

Q. Then, if I understand you correctly, the deed of trust was made prior to the time you determined what you would do with the surplus, whether there would be an assignment or a receivership?

A. I think the whole thing was decided there, just how we should wind it up and what we should do.

Q. When was it decided?

A. On that day, I think, sir.

Q. Did not Ess act for you in this winding-up proceeding?

A. Yes, sir.

Q. Was the matter decided before Ess got the consent of the Kansas City Savings Association to act for you?

A. It was afterward.

Q. Then it was after the deed of trust was made?

A. I think so; yes, sir.

Q. How long was it after Mr. Stewart received this deed of trust, on February 16th, 1882, until attachments were issued and Mr. Stewart garnisheed?

A. I don't know, sir; it was along in a day or two; it may have been the next day; it was either the 17th or 18th that Plankington and Armours brought an attachment for about six or seven hundred dollars. They came in pretty lively a few days after-
288 ward.

Q. Don't you remember that it was pretty nearly a month afterward?

A. No, sir; I don't. I could not say how long it was before attachments came in.

Q. Now, these claims of the Macon Savings Banks amount to about forty or fifty thousand dollars, don't they?

A. I don't know how much they amount to exactly.

Q. Did you on the 16th of February, 1882, know anything about the amount of these debts?

A. No, sir; I did not.

Q. Your books did not show and don't now show any account at all with the Macon Savings Bank or the Farmers' & Traders' Bank?

A. It shows an account with the Macon Savings Bank. I think it does.

Q. But it does not show an account to the extent they got judgment for?

A. No, sir.

Q. It don't show anything at all with reference to the Farmers' & Traders' Bank?

A. I think the books show only about $4,500.

Q. You do not know what the amount is?

A. No.

Q. It is a small amount compared with what they got judgment for?

A. Yes, sir.

Q. Did not this letter from J. B. Melone, received by R. A. Melone on the morning of February 16th, 1882, request that the Macon Savings Bank be preferred?

A. It is my impression that it did; since hearing Mr. Melone testify here the other day I have thought the matter over and
289 I am under the impression that it did make the request, if possible, to prefer the Macon Savings Bank.

Q. How long after February 16, 1882, did you continue to believe that the assets of the firm of Benedict, Melone & Co. would pay all their debts and liabilities and leave a surplus for division among the partners?

A. Well, I believed so for some time afterward; I don't know how long, but until the matter commenced to show up.

Q. Wasn't it as much as a month afterward?

A. I expect it was.

Q. Did you speak to Mr. Stewart about making an assignment and preferring the Macon Savings Bank?

A. No, sir; I don't think I did.

Q. Did R. A. Melone do so in your presence?

A. I don't know, sir, whether he did or not.

Q. Well, the final conclusion that you arrived at was that no assignment should be made?

A. Yes, sir.

Q. That was your intention?

A. That was the final conclusion.

Q. Not to make an assignment?

A. Not to make an assignment.

Q. When the attachments were brought and Mr. Stewart gar-

nisheed don't you remember that R. A. Melone, James B. Melone, and C. H. Benedict put in pleas in abatement and disputed the ground on which they were issued?

A. I believe so.

Q. Were any of them ever tried that you remember of?

A. I don't know whether they ever were or not.

Q. Don't you remember one being tried before Judge Black; don't you remember that the Garth attachment was tried before Judge Black?

290 A. Yes, sir; I think so.

Q. You were a witness in the case?

A. I believe I was; I had forgotten that.

By Mr. DEAN:

Q. Mr. Ess acted as your attorney in some of these matters?

A. Yes, sir.

Q. You have no objection to his testifying to what he knows about that?

A. No, sir.

Q. Or what conversations passed between you and him and Mr. Craig and others?

A. No, sir.

Q. You are willing that the facts, just as they are, to the best recollection of all parties, shall be given?

A. Yes, sir.

Q. Now, at the time this matter of preference came up, you thought that probably you would wish to commence business here again and wished to show your friendly disposition toward the banks by preferring them. Was not that one motive that caused you to execute the deed of trust?

A. Well, that might have been one motive.

Q. You had expected that the debts would be paid in full and your capital in the business would come out unimpaired?

A. Yes, sir.

Q. Now, why was it that you did not prefer the Macon Savings Bank if there was a request made at the time? Did it come in the shape of anything amounting to a request, or was it merely a suggestion?

A. Well, I think it was a request from them; I think they asked us to prefer them.

Q. Why didn't you do it? The Bank of Kansas City never

291 made any such request.

A. Well, I don't know why we didn't, but we didn't; we preferred the three banks here.

Q. You thought you had ample means to pay all liabilities and it would have cost you nothing to have preferred that bank; why was it that you did not execute a mortgage, deed of trust, or some other security that would be valid in preferring the Macon Savings Bank, in which James B. Melone was interested?

A. Well, the only reason was, I suppose, that there was nobody here to push his claim, or anything of the kind. If Mr. James B. Melone

had been here it would have been done, probably, or some one to call it up.

Q. There was no one here to push the claim of the Bank of Kansas City?

A. No; but there was to push the other banks' claims, and I said if Mr. Wilson's bank was preferred the others should be also.

Q. Now, you said something about your expectations of being able to pay out. Do you know anything about what the whole indebtedness was at the time, not counting the accommodation liabilities?

A. No, sir.

Q. Do you recollect that the newspapers, the commercial agents, the banks, Mr. Stewart, and others were furnished at that time with a statement of your assets and liabilities?

A. Yes, sir.

Q. Do you know from whom those statements were derived?

A. I do not; they were taken from the books, I expect; I did not give them any.

Q. Your books were correct?

A. I suppose so.

Q. If the books were correct you could look over them and
292 get an idea of the assets and liabilities?

A. Yes, sir.

Q. You did not really consider this a failure; you were simply attempting to make provisions against any trouble that might arise on account of James B. Melone's complications with the Macon Savings Bank?

A. No, sir; I considered it a failure.

Q. Well, you had not failed?

A. It amounted to the same thing.

Q. Benedict, Melone & Co.'s paper had always been met?

A. Yes, sir.

Q. Benedict, Melone & Co. were not owing anything at the time?

A. Not much.

Q. But J. B. Melone, a partner, had become complicated in the failure of a bank at Macon City?

A. Yes, sir.

Q. And it was anticipated that his creditors would attempt to reach his interest in the firm here?

A. Yes, sir.

Q. That was the principal inducement to you in taking the action you did?

A. Well, there were other transactions also. There was parties here threatening to run attachments if we did not secure them.

Q. That was simply on the theory that the involved creditors of J. B. Melone might interfere with the progress of the business of Benedict, Melone & Co., and for that reason they wanted security?

A. I suppose so.

Q. It was not on the theory that Benedict, Melone & Co. were insolvent?

A. No.

293 Q. Because it was considered by all parties at the time that Benedict, Melone & Co. were solvent?

A. I suppose so.

Q. Now, Mr. Benedict, how much of this accommodation paper was there at the time outstanding which has been subsequently allowed?

A. I don't know how much has been allowed.

Q. How much accommodation paper had been executad in favor of the Macon Savings Bank which had been indorsed to other banks?

A. I don't know.

Q. How much indebtedness for money absolutely received from the Macon Savings Bank was exhibited on your books at that time?

A. I think about five thousand dollars.

Q. Wasn't it decided at that time in your conversation with Stewart, Ess, and other parties that that was the sum total of money absolutely received from the Macon Savings Bank?

A. Well, I don't know what statement was made in reference to it.

Q. If there was any more money received by you from the Macon Savings Bank than that amount why didn't it and don't it appear on the books?

A. I don't know, sir; Mr. Melone was the book-keeper.

Q. Had he any motive to conceal anything from you?

A. No, sir; I don't think he had.

Q. At the beginning of the year you made a statement to James B. Melone of the condition of Benedict, Melone & Co.?

A. Yes, sir.

Q. I understand that that statement exhibited the fact that the firm had made during the preceding year, clear of all losses, some nine thousand dollars?

A. Yes, sir; that is what it did, according to the statement.

Q. Now, that statement was based upon an estimated value
294 of your stock at the time?

A. Yes, sir.

Q. Your bills payable and outstanding accounts?

A. Yes. sir.

Q. And when you made the estimate of the value of the stock you endeavored to put upon it its then fair value?

A. Yes, sir.

Q. Without exaggeration?

A. Yes, sir.

Q. You didu't pad anything?

A. No, sir.

Q. And your invoice was a fair, honest invoice?

A. Yes, sir.

Q. Now, don't you know, Mr. Benedict, that if this indebtedness which subsequently came up as being a part of the indebtedness of your firm for money loaned the bank had been included in your statement made on the 1st day of January, upon that day you were insolvent by several thousand dollars?

A. I expect it was, sir.

Q. Don't you know that, taking your books as they were at that time——

A. Well, Mr. Melone had a separate entry for these accounts.

Q. Now, the statement furnished on the day the receiver was appointed exhibited a surplus of assets over your liabilities?

A. I don't know that there was any statement exhibited; I didn't see that.

Q. Well, in your conversation it was stated that you had a surplus of eighteen thousand dollars, at least, and it was further stated that your liabilities to the banks at Macon for money absolutely received was about forty-five hundred dollars?

A. I don't remember any such statement.

295 Q. Don't you think it was stated so?

A. No, sir; I don't think so.

Q. You have stated that when that letter came to you you did not regard its language mandatory or binding upon you at all—the letter that came to you through the hands of Mr. Saunders from J. B. Melone?

A. Well, he was advising us what to do, and told us the state of affairs there.

Q. It was simply advisory, saying it would probably be better for you to make an assignment or something of that character?

A. Yes, sir.

Q. You did not feel specially bound by any directions contained in the letter?

A. O, no.

Q. If you had felt yourself bound by that letter you would have endeavored to execute its terms?

A. Certainly. The main thing in the letter was that the bank had failed down there, and advising us to do the best we could here.

Q. Now, Mr. Benedict, James B. Melone was advised, was he not, about what steps you had taken here shortly afterward?

A. I don't know. I did not hear from him for a long time afterward. I don't think I wrote to him for a year, probably, myself.

Q. He never attempted to dispute your authority or repudiate your action in making the deed of trust preferring these banks and having a receiver appointed?

A. No, sir; never has yet.

Q. The advice in that letter was, in substance, to do the best you could, and suggesting what line of policy he would probably pursue?

A. I tried to state exactly what was in that letter here. I

296 will state it again if you wish it.

Q. Yes.

A. He went on to state that the Macon Savings Bank and the Farmers' & Traders' Bank had made assignments, and it would be necessary for us to do something of the same kind here, and suggested Mr. Charley Stewart as a suitable person to act in that capacity, and also says, if it is possible, to prefer the Macon Savings Bank. In other words, to make the Macon Savings Bank a preferred creditor.

Q. That is about the substance of it?
A. Yes, sir.
Q. Now, do you recollect of the brother, R. A. Melone, writing to J. B. on several occasions after that?
A. No, sir; I do not.
Q. Don't you know that he did write to him frequently?
A. I suppose he did, but I don't know how long after the failure it was before Dick wrote.
Q. Did R. A. Melone exhibit any of the letters received from J. B.?
A. No, sir; I don't think he did. I am under the impression that Dick didn't write to him for quite a long time; that is simply my impression.
Q. You felt that the management of the business here was entirely in the hands of yourself and R. A. Melone, and felt that any action you might take in the premises, according to your best judgment, would be confirmed by J. B. Melone?
A. Yes, sir.
Q. And when he was informed of it he made no objection to anything you did in the matter of preferring the banks here in the deed of trust and having a receiver appointed?
A. No, sir; he never made any objection.
297 Q. He has never complained to you that you did not act according to your best judgment?
A. No, sir.
Q. He has never even condemned it?
A. No, sir.
Q. You stated in your examination-in-chief that you knew the condition of the firm of Benedict, Melone & Co. on the day that Mr. Stewart was appointed receiver; how did you learn that fact?
A. Well, I think it was got from a statement Mr. Melone had taken from the books, I suppose.
Q. You knew a gentleman here by the name of Donald or McDonald; did you know the brother of Whitten McDonald?
A. Yes, sir.
Q. He was proposing to take some interest in your business at one time, was he not?
A. Yes, sir.
Q. You drew off a statement showing the condition of your firm for his benefit, did you not?
A. I think not.
Q. There was such a statement?
A. Probably there was.
Q. Do you remember what the statement exhibited?
A. No, sir.
Q. The statement was correct whatever it showed?
A. I suppose so.
Q. Your assets were not overestimated in that statement?
A. No, sir.
Q. It was based upon your invoice taken in the January previous?
A. Yes, sir.

Q. That invoice was not taken with a view to sell the property?

A. No, sir.

298 Q. It was taken merely to inform yourselves of your financial condition at that time?

A. Yes, sir.

Q. Do you recollect what interest you proposed to sell to McDonald?

A. I think a two-thirds interest, probably; I am not sure.

Q. Do you recollect what you demanded for the two-thirds interest?

A. No, sir.

Q. Now, there was no pressure brought to bear upon you particularly, was there, to induce you to take the action you did at the time you made the deed of trust?

A. No, sir. I would not have had any pressure. If they had gone to "bucking" too hard I would have "bucked" the other way.

Q. You have never yet lost that privilege as an American citizen?

A. No, sir.

Q. Now, Mr. Stewart suggested that the Bank of Commerce should be preferred, and it was on the theory that, *as* inasmuch as he had recommended you to that bank and to a certain extent given you credit at that bank, he thought it desirable that you should prefer them?

A. Yes, sir; it was upon that idea, and I had no special objection to preferring them, as I thought we would pay everybody anyway, but I wanted, then, all the banks preferred and wanted to protect our interests here.

Q. You did not regard Mr. Stewart as an indispensable person to act as receiver?

A. No, sir; but he had been an old friend of ours and we preferred him to anybody else we knew of.

Q. Therefore you preferred him and preferred the banks, too?

A. Yes, sir.

299 Re-examination by Mr. DYSART:

Q. You answered in your cross-examination that Judge Ess drew the petition for a dissolution of the partnership and the appointment of a receiver; who acted in that case as your attorneys, did Karnes & Ess?

A. Yes, sir.

Q. Who paid that firm for their services?

A. I could not say, sir, who did. I did not.

Q. Have you paid them?

A. No, sir.

Q. Was it understood at that time who was to pay the fees, whether you or the receiver?

A. I don't know that there was any understanding about it at all.

Q. Has the firm of Karnes & Ess ever presented any bill to you for the service?

A. No, sir.

Q. Who acted as attorneys for the receiver at this time?

A. Karnes & Ess.

Q. Mr. Ess asked you in the cross-examination if the suit for a receivership was not determined upon after the deed of trust had been executed? Please answer that question now.

A. I believe it was; yes, sir.

Q. You are speaking of your recollection of it now, or at that time?

A. I am speaking of my recollection of it now.

Q. Was the suit for the receivership determined upon before or after it was determined upon to make a deed of trust. I am not talking now of what was done first, but what was agreed upon?

A. Well, I am under the impression it was afterwards—soon afterwards, or the same time, about; yes, sir; it was afterwards.

300 Q. Do you mean that it was done afterward or determined upon afterward?

A. It was done afterwards, but whether it was determined upon afterwards I can't say. I have been under the impression ever since that these things were determined right there and we went right along and done them. I can't state exactly.

Q. I asked you, I believe, on the direct examination if you would have done one without the other?

A. Yes, sir; and I stated in answer that I would not.

Q. Then, will you answer the question whether or not you determined upon your course fully before you proceeded to dispose of your property in the manner stated?

A. Well, I think so. We got it in shape there, I suppose.

Q. State if you were informed in that conversation there about the matter, by your attorneys, that you could not prefer the Macon Savings Bank by a deed of assignment?

A. No; I don't know that I was; there was nothing said about the Macon Savings Bank.

Q. They did not inform you that you could not prefer any creditor by a deed of assignment?

A. That is what I understood; yes, sir—that is, I mean to say that we could not make an assignment without——

Q. Taking all in?

A. Yes, sir.

Q. Well, when you discovered that you could not prefer a creditor by an assignment, then you abandoned the project of an assignment?

A. Well, we could not make an assignment, as I understood it, without the signature of J. B. Melone, anyway, to the instrument, and that would take until the next day to procure, and we were fearing attachments on the concern.

301 Recross-examination by Mr. DEAN:

Q. Now, Mr. Benedict, it was thought that day that a deed of assignment could not be made so as to prefer these banks, and it was

also thought proper and advisable to prefer the banks in Kansas City?

A. Yes, sir.

Q. Now, were you not aware of the fact that if Mr. Stewart, as trustee under the deed of trust, took possession of the property that attachments were liable to be run?

Objected to by complainants' counsel as calling for a conclusion.

A. Yes, sir; that was my idea.

Q. Now, was it not then afterward determined upon, after you had agreed upon having these banks preferred and the deed of trust was given, wasn't it then a matter of discussion and debate as to what you should do next, and was it not finally agreed upon that evening or the next morning that a receiver should be appointed?

A. Well, it was debated, there is no question about that, but that was what we were trying to get at, and we left it to the other fellows to do it.

Q. Isn't it true, as a matter of fact, that the position was taken first by your firm and determined upon first by your firm to have a receiver appointed after Mr. Stewart had been appointed trustee and had taken possession of the property as trustee?

A. It was just like I stated it here in my testimony, that that would have accomplished but half of the purpose.

Q. But isn't it true, as a matter of fact, that that is what you did next after the deed of trust was executed and delivered to
302 Stewart, as trustee, the receivership was agreed and determined upon?

A. That may —; it might have been that the deed of trust was executed first and the other afterward; but that is what we wanted to do, and I didn't know which they were going to do.

Q. Then you had no definite purpose as to what should be done?

A. Yes, sir; we had a definite purpose enough.

Q. What purpose was it?

A. To pay the banks off; make a deed of trust in favor of the banks and appoint a trustee to wind up the business, or a receiver to wind up the business and pay off the balance.

Q. How could you have determined upon a receiver?

A. Well, to put it into that shape, I don't know whether you would call it a receiver or what.

Q. The question of what disposition you would take after the deed of trust was executed was left to Mr. Stewart, Mr. Ess, and your attorneys?

A. Yes, sir; I expect so. It was not left to Mr. Stewart and Mr. Ess any more than it was left to me, I should think. We all talked about it. I don't know how to answer a question like that, anyway. Mr. Ess and our attorneys knew what we wanted to do, what kind of shape we tried to put it in, and they put it in that shape, which was, I suppose, *was* the best and only way it could be done.

Q. Well, R. A. Melone, yourself, Mr. Stewart, and Mr. Ess first

agreed upon one thing, and that was that the banks in Kansas City had better be preferred?

A. Yes, sir.

Q. And then the matter came up, after that had been done, what should be next done with the property to protect it from attachments, and it was finally determined on by Mr. Ess, after consulting authorities, that you had better go into court and have a
303 receiver appointed to wind up the affairs of the partnership and ascertain J. B. Melone's interest; now, is that not correct?

Objected to by complainant's counsel as involving a number of questions in one, and as being incompetent, irrelevant, and immaterial.

A. Well, you have got it all; you cover the whole ground. That is about it.

Q. Now, you do recollect, then, that it took Mr. Ess and Mr. Craig some time after the deed of trust was executed to determine upon the course which you should next take in the matter; that he did examine authorities, and it was not until towards evening sometime or the next day that they went to work to prepare the petition for a receiver?

A. I don't know how long it took him or anything about that. I could not say, sir.

Q. Now, when you went to Mr. Craig and to Messrs. Karnes & Ess you had determined on no particular plan of action?

A. No, sir; the idea was when I went there—well, the idea was when I went there to make an assignment; that is the idea exactly. I went there to make an assignment of the business to Charley Stewart. That's the only thing I knew about it. This thing came up afterward, and it was talked over afterward.

Q. And then you decided to prefer the banks?

A. Yes, sir; you have it exactly.

Q. And finally you agreed to do something else?

A. Well, about that time or soon after.

Q. How many hours was it?

A. Well, it wasn't many hours; an hour or two.

Q. But the preference became an executed fact previous to that?

A. Possibly it did. I can't say any more than that.

By Mr. DYSART:

Q. I want to ask you if you have any objections to Mr.
304 Craig testifying, in the event that we want his testimony, as to what transpired at the time he was acting for you?

A. No, sir; I have none in the world.

By Mr. DOUGLASS:

Q. Your answer all the way through is that you disposed of your property for the benefit of your creditors?

A. Yes, sir.

Q. First by this preference and, finally, by some other mode to effectuate your intention?

A. Yes, sir.

Signature waived.

Sworn to before me on the day, at the place, and within the hours last aforesaid, but by consent of counsel for complainants and respondents the signature of the said witness was waived.

JULIUS C. HUGHES,
Notary Public.

It is hereby stipulated and agreed by and between the counsel for complainants and respondents that the statement of facts, marked Exhibit "C" and hereto annexed, may be read in evidence on the trial of this cause the same as if regularly proven by competent testimony.

JULIUS C. HUGHES,
Notary Public.

UNITED STATES OF AMERICA,
Western District of Missouri, } ss:

I, Julius C. Hughes, notary public in and for the county of Jackson, State of Missouri, duly commissioned, qualified, and acting as such under and virtue of the several acts of Congress authorizing and regulating the taking of depositions *de bene esse* in civil
305 causes depending in circuit and district courts of the United States, do hereby certify that the witnesses whose depositions are above set forth are material and necessary to the proper determination of the said cause in the caption set forth and described, and that the said Jas. B. Melone is a resident of Jamesport, in the county of Daviess, in the State of Missouri, and that the said R. A. Melone lives at Oswego, in the State of Kansas, and that the said C. H. Benedict is a resident of Kansas City, in the said Jackson county, Missouri. I further certify that a notice of the time and place of the taking of said depositions and the names of the witnesses to be examined, signed by Dobson & Douglass, of counsel for complainants, was accepted on Feb. 2nd, 1884, by Warner & Dean, of counsel for the defendants, as appears by said notice, marked Exhibit "1," and herewith returned; and I further certify that I was attended at the law office of Dobson & Douglass aforesaid by Dobson & Douglass and B. R. Dysart, of counsel for complainants, and Henry N. Ess and Oliver H. Dean, of counsel for defendants, and the said witnesses, Jas. B. Melone, R. A. Melone, and C. H. Benedict, who were all of sound mind and lawful age, and were by me sworn and examined, and their examination was, by consent of counsel present, taken in short-hand and reduced to writing in my presence on the day, between the hours in that behalf first aforesaid.

I further certify that neither I nor M. E. Jones, who took said depositions in short-hand for me, are of counsel or attorney for either of the parties to the suit in controversy or in any way interested in the event of said suit.

In testimony whereof I have hereunto set my hand and notarial seal this 18th day of February, 1884.

[SEAL.] JULIUS C. HUGHES,
Notary Public.

306–313 Notary fees of Julius C. Hughes, including stenographer's charges:

Jas. B. Melone, witness	$10 00
R. A. Melone	18 70
C. H. Benedict	4 50

I certify that the above fees were paid by Dobson & Douglass, of counsel for complainants.

JULIUS C. HUGHES,
Notary Public.

(Exhibit A omitted in printing, per stipulation. See p. 444.)

314 EXHIBIT "C." Julius C. Hughes, Notary Public.

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Equity.

THE UNION NATIONAL BANK OF CHICAGO *et al.*, Complainants,
vs.
THE BANK OF KANSAS CITY *et al.*, Respondents.

It is agreed and stipulated between the complainants and respondents in the above-entitled cause that the following statement of facts may be read in evidence on the trial of said cause the same as if regularly proven by competent testimony:

That the Union National Bank of Chicago, complainant, was, on the 16th day of February, 1882, and for a long time prior thereto, as also at the institution of this action, and still is, a banking corporation duly organized under the laws of the United States in regard to national banks, with its chief office or place of business in the city of Chicago, State of Illinois, and said Union National Bank was at said times and is a citizen of the State of Illinois.

That the complainants, Peter Lorillard, Charles Seedler, and Pierre Lorillard, were at said times partners doing business under the firm name of P. Lorillard & Co., in the State of New Jersey, and are residents and citizens of the said State of New Jersey.

That the complainant, Boston Sugar Refining Company, was at said times and still is a corporation doing business in and organized under the laws of the State of Massachusetts, and was and is a citizen of said State of Massachusetts.

That the complainants, Marx W. Mendel and Emanuel
315 W. Mendel, were at said times and still are partners doing business under their firm name M. W. Mendel & Bro., in the State of New York, and were and are residents and citizens of the State of New York.

That the complainants, Henry C. Bannard and —— Lyman, were at said times and still are partners under the firm name of Bannard, Lyman & Co., in the State of Illinois, and that they were and are residents and citizens of the State of Illinois.

That the complainants, John Arbuckle, Charles Arbuckle, and William V. R. Smith, were then and still are partners doing business in the firm name of Arbuckle Bros., in the State of New York, and are residents and citizens of the State of New York.

That the complainant, The Continental Sugar Refinery, was at said times and still is a corporation organized under the laws of and with its chief office or place of business in the State of Massachusetts, and is a citizen of the State of Massachusetts.

That the complainant, The Standard Sugar Refinery, was at said times and still is a corporation organized under the laws of and with its chief office or place of business in the State of Massachusetts, and is a citizen of the State of Massachusetts.

That the complainant, The Leavenworth Sugar Company, was at said times and still is a corporation duly organized under the laws of and with its chief office or place of business in the State of Kansas, and is a citizen of the State of Kansas.

That the respondent, The Bank of Kansas City, was at said times and still is a corporation duly organized under the laws of the State of Missouri, and is a citizen of the said State of Missouri.

That the respondent, Citizens National Bank of Kansas
316 City, was at said times and still is a corporation duly organized under the laws of the United States in regard to national banks, with its chief office or place of business in the city of Kansas and State of Missouri, and the said Citizens' National Bank is a resident and citizen of said State of Missouri.

That the respondent, The Bank of Commerce, is now and has been since — day of July, 1882 a corporation duly organized under the laws of the State of Missouri, with its chief office or place of business at Kansas City, Mo., and is now and has been since said date a citizen of said State, and that said Bank of Commerce was, on the 16th day of Feb., 1882, and long prior thereto, known and called by the name of the Kansas City Savings Association.

That the indebtedness due the complainants from and by the firm of Benedict, Melone & Co., together with the judgments rendered thereon, are correctly set forth in complainants' amended bill, and that the said indebtedness accrued prior to Feb. 16th, 1882; that on the — day of March, 1884 executions were issued on said judgments against said defendants, J. B. Melone, R. A. Melone, and C. H. Benedict, and directed, respectively, to the sheriffs of the counties of Clay, Davies, and Jackson, in the State of Missouri, which were duly returned *nulla bona* at the April term, 1884, of said Jackson circuit court.

That on Jan. 26th, 1883, Chas. Stewart, receiver of Benedict, Melone & Co., filed in said Jackson circuit court a report of his proceedings, and in which he reports the amount of funds in his hands, as receiver, to be altogether the sum of $36,278.24, and further shows—

Claims presented and approved Jan. 6, '83	$48,341 38
Claims not presented, but thought good	2,095 61
Claims in litigation and considered doubtful	35,891 66
Total claims	$86,328 65

317–320 And asked for an order to pay on all the claims allowed and those considered good a dividend of 33⅓ per cent. on Feb. 1st, 1883, which order was granted by the court.

That all the indebtedness of the firm of Benedict, Melone and Company accrued prior to Feb. 16th, 1882, and the total indebtedness of the firm, including claims approved by the receiver, judgments rendered, and the preferred Kansas City Bank debts, which were never included in the receiver's report, amounted to about $115,000.00.

That the said sum of $36,278.24, reported as being in said receiver's hands, was the net amount, exclusive of expenses paid and also exclusive of the preferred Kansas City Bank debts, which had theretofore been paid by Charles Stewart.

That the Boatman's Savings Bank of St. Louis, Mo., recovered judgment on — day of ——, 188–, in said Jackson circuit court against Charles H. Benedict *et al.*, composing firm of Benedict, Melone & Co., for $5,315.25.

That the St. Louis National Bank of St. Louis, Mo., recovered judgment on the — day of ——, 188–, in said Jackson circuit court against the same defendants, Chas. H. Benedict *et al.*, for the sum of $4,827.50.

DOBSON & DOUGLASS,
Att'ys for Complainants.
WARNER & DEAN,
For Bank of Kansas City & Citizens' National Bank.
KARNES & ESS,
Att'ys for Bank of Commerce.

(Subpœnas omitted in printing per stipulation. See p. 444.)

321 *Testimony for the Defendants.*

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri.

THE UNION NATIONAL BANK OF CHICAGO *et al.*, Complainants,
vs.
THE BANK OF KANSAS CITY *et al.*, Defendants.

L. F. WILSON, having been duly sworn as a witness for the defendants, testified as follows:

Direct examination by Mr. Ess:

Q. What is your name?
A. Luke F. Wilson.

Q. Where do you live?
A. Kansas City.
Q. What is your business?
A. Banking.
Q. In what bank?
A. The Bank of Commerce; at the time of this transaction we were just about reorganized.
Q. What was the name of the bank before?
A. The Kansas City Savings Association, at the time this matter was closed up.
Q. You are acquainted with Mr. Charles Stewart?
A. Yes, sir.
Q. Do you know the different members of the firm of Benedict, Melone & Co.?
A. Do I know them personally?
Q. Yes, sir.
A. I know all but one, the Macon member—I suppose I do; there were but three.

Q. Who were the two members that you knew?
322 A. R. A. Melone and C. H. Benedict.
Q. How long have you known them?
A. I have known Benedict since the time he came here and opened the tobacco store. I guess they must have been here over four years; I would say about four years. I cannot, of course, be exact.
Q. At what time did the firm of Benedict, Melone & Co. commence doing business at your bank?
A. About ninety days before they closed; that is my recollection.
Q. Did you have any conversation with them before they commenced doing business with you?
A. Yes, sir.
Q. Which ones?
A. With both. I had the most, however, with the book-keeper, Mr. Melone.
Q. State what the conversation was.
A. He wanted to open an account with us and came to see us; we told him we would investigate the matter. First, Mr. Stewart called to see if we would accept the account, and gave us what he supposed was a fair statement of their affairs, and I went to see them and we had further conversation. They said they had thirty thousand dollars, I think, capital; that they had been doing well and would show good large profits for the year's business; I cannot give the amount, but it was a good round profit, and that they were not largely in debt to any one; that the outside limit of the discounts and credit they would want would be about ten thousand dollars; that they would close up their account at the Bank of Kansas City and give us the benefit of their business.

Q. This was about how long before they failed?
323 A. I don't think it could have been more than three or four months.
Q. You may state what time they failed.

A. I don't know. I made a memorandum of the date the trustee paid us, but not of that.

Q. What day was it, with reference to your getting the deed of trust on the property?

A. They closed doors the next day after I got the deed of trust.

Q. What was the first intimation that you had of the firm being in trouble?

A. I can't say whether I got it from the newspapers or whether I got it from Mr. Stewart coming in and telling us that the bank at Macon City had failed. If it was in the papers I got in the morning in the newspapers.

Q. What did you do then?

A. I went right down and interviewed the partners, and told them that my impression was, inasmuch as it was an unincorporated firm, they had better secure me; that if they didn't secure me I would attempt to secure myself before somebody else got the start—before a stampede of creditors got started towards them.

Q. What reply did they make?

A. They said they were solvent unless the failure of the bank jeopardized their affairs in such a way that they couldn't pull through.

Q. Were R. A. Melone and C. H. Benedict in any way connected with the Macon Savings Bank?

A. They claimed not; they claimed their affairs were all straight if they could go ahead without the complications which the Macon Savings Bank would place them in.

Q. Did they tell you how much they owed the Macon
324 Savings Bank?

A. No, sir; they did not.

Q. What time in the day was it?

A. I think it must have been about eight o'clock, or between eight and nine.

Q. You saw them at their office?

A. Yes, sir; at their place of business.

Q. Where was that?

A. It was between Third and Fourth, on Delaware, on the west side.

Q. What did they say then with reference to securing you?

A. Well, they said they wanted to do what was right, and that they would go and consult their attorney, who seemed to be H. H. Craig, as near as I could find out. They went around there, at least, and had a talk with Craig, and they said that they thought it nothing more than right for the Bank of Kansas City to be represented. That was the first I knew about them. I supposed they had paid them up. I told them, of course, I had no objection, and I suggested that we come and consult our attorneys in regard to it and have the papers drawn up.

Q. Where did the parties then go?

A. They came to Karnes & Ess' office and commenced work on the deed of trust.

Q. You brought your notes and drafts up?

A. Yes, sir; brought them up there and made a copy of them.

Q. That is, you mean to say they were copied into the deed of trust?

A. Yes, sir.

Q. Do you remember what time that deed of trust was finished?

A. It was after dinner, probably two o'clock, or might have been three; it was after dinner, I know.

Q. Were you in the office of Karnes & Ess about noon of that day?

325 A. Yes, sir.

Q. Who else came up there for the purpose of getting debts secured?

A. Joe Cooper, president of the Citizens' National Bank, came in and wanted to know if he couldn't have his claim added to the others—that is, if he couldn't be secured with the other two banks, and we consented to it.

Q. State whether Cooper or Whipple brought up these notes.

A. I don't know which one brought them up, but Cooper came in and called Malone out first and had a talk, and then came in and talked to me and the two or three of us who were sitting there. I don't know who they were. I know I was present. I don't remember who brought the notes up, whether it was Cooper or Whipple.

Q. Who was acting as attorney for the bank in securing this debt?

A. Karnes & Ess.

Q. What time were you first informed of the deed of trust having been completed and delivered to Mr. Stewart?

A. My recollection is that it was near three o'clock. It is pretty hard to remember these things. It was something I didn't attach great importance to. It was after dinner, I think, near three o'clock.

Q. Who informed you?

A. I don't know whether I was informed by my own observation or whether you informed me.

Q. Do you remember of Ess coming up to the bank that evening to see you and White?

A. I remember that you came there after the papers were finished.

Q. What did I say?

326 A. You said that the deed of trust was all prepared securing the three banks, and that Dick Malone and Benedict claimed that there would be a surplus, and that they desired to be represented in this matter, so they wouldn't lose everything they had in the enterprise, and wanted you to act as their attorney in the matter. You being engaged by us, you wanted to know our feelings in regard to it, and, inasmuch as our claims, as we supposed, were secured, we had no objection to your representing them.

By Mr. DOUGLASS: I object to this question and answer as incompetent, irrelevant, and immaterial.

Q. You consented that Karnes & Ess should act for either Benedict or Malone, or both of them, as they might determine?

A. Yes, sir.

Q. State whether Mr. Stewart opened an account with you afterwards.

A. Yes, sir.

Q. How was the account opened?

A. Charles Stewart, receiver, or Charles Stewart, trustee, I don't know which.

Q. Is this paper a copy from your books?

A. Yes, sir; this is copied from our books. "Charles Stewart, trustee for Benedict, Malone & Co."

Q. This is the way it appears on your books, is it, Charles Stewart, trustee B., M. & Co.?

A. Yes, sir.

Q. State whether, on or after February 17th, 1882, Charles Stewart, trustee B., M. & Co., made any deposits.

A. Yes, sir.

Q. And, if so, what deposits?

A. February 17th, 1882, $973.32; 18th, $656.15; 20th, $774.33; 23rd, $1,293.11; 24th, $1,558.35; 25th, $937.93; March 4th,
327 $1,160.75; 6th, $1,083.31; 7th, $2,088.22; 8th, $974.53.

Q. What checks were made on this account?

A. March 8th, $11,498.44.

Q. What is this check for?

A. It is in payment of our claims—the notes and drafts against Benedict, Malone & Co.

Q. Did Stewart pay them that day?

A. Yes, sir; by check.

Q. How was the amount continued after this; do you remember whether it was continued the same way as trustee or receiver, or both?

A. I can't remember that. I have investigated and find that it was still continued as trustee on our ledger.

Q. State whether you remember about attachments being issued against Benedict, Melone & Co. and the property in the hands of Charles Stewart being garnisheed.

A. Yes, sir; I remember about that.

Q. Do you remember that Plankington & Armours or the Armour Bros. Banking Company was the first attachment?

A. I think Plankington & Armours; that is my recollection.

Q. Now, what was done to Stewart at the time this money was paid over by him to your bank; was any indemnity given him?

A. We gave him an indemnity bond, holding him harmless for any loss that should accrue to him for paying the three banks.

Q. You gave that bond to Mr. Stewart?

A. Yes, sir.

Q. Well, what became of the notes and drafts that you had, that were secured by this deed of trust, when they were paid?

A. We surrendered them to Mr. Stewart.

Q. What were these notes and drafts given for?

A. For money loaned.

Q. At what discount?

328 A. Ten per cent. discount per annum.

Q. Then Benedict, Melone & Co. got the money for all these drafts and notes that were embraced in this deed of trust?

A. Yes, sir.

Q. At the time of the making of this deed of trust Charles H. Benedict and Richard A. Melone claimed they were solvent, did they not?

A. Yes, sir; said they had a surplus; that they would have a surplus of about twenty thousand dollars, after paying everybody and everything.

Q. When did you first learn that that was not the fact?

A. The attachments began pouring in and Mr. Stewart made an investigation of their affairs and found that they were not in as good condition as they had represented.

Q. How long was this after the deed of trust had been made?

A. They had failed in February, and it was between three and four weeks, I think. I wouldn't, of course, swear exactly.

Q. State whether you knew of any accommodation paper, or of any of this paper made to the Macon banks by Benedict, Melone & Co. prior to the date your debt was paid by Stewart, trustee?

A. Yes, sir; I found it out.

Q. To what extent?

A. No one could tell. It was very uncertain.

Q. Did you know at the time of the payment by Stewart of this $11,498.44 to you that Benedict, Melone & Co. owed the Macon banks, or were their endorsers to the extent of forty-five or fifty thousand dollars?

A. No; I didn't know the amount. I knew there was accommodation paper out, but I didn't know how much; there were so many rumors and so few facts we couldn't get at exactly the truth. I will state that the Bank of Commerce succeeded to the business of the Kansas City Savings Association July 1st, 1882, taking their assets and assuming their liabilities.

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Cross-examination by Mr. DOUGLASS:

Q. Did I understand you to say, Mr. Wilson, that you heard of the failure of the Macon Savings Bank from the papers, or perhaps Mr. Stewart, that morning—the morning of the day this deed of trust was made?

A. One or the other; I couldn't say which.

Q. When you heard of that you went to see these parties—Benedict, Melone & Co.—about securing or paying your debt?

A. Yes, sir.

Q. And you found them at the office of Henry Craig?

A. No. I found them at their office; their doors were open that morning, and they went with me to their attorney, Henry Craig.

Q. To Craig's office?

A. Yes, sir.

Q. I understand you to say, in your direct examination by Mr. Ess, that you heard of the failure of the Macon Savings Bank, and you wanted them to secure your claim—secure your debt?

A. Yes, sir.

Q. And that you told them if they didn't secure it, after some conversation with them, that you would take measures to secure yourself?

A. Yes, sir.

Q. That you couldn't undertake at that time to know the full complications or effect of the failure the Macon Savings Bank would have upon them here; that was the substance?

A. Yes, sir. I supposed that the creditors would be over attaching their effects.

Q. Then, after some conversation there in the office of Craig, you asked them to come to see your attorneys, Karnes & Ess?

330 A. Yes, sir.

Q. You came, did you, with them and Mr. Craig?

A. Yes, sir.

Q. Now, what time in the morning was that when you reached the office of Karnes & Ess?

A. I should judge that it wasn't far from nine o'clock; it must have been after nine; it was between eight and ten—I should say about nine o'clock.

Q. After you first saw R. A. Melone and C. H. Benedict at their business house you remained with them until you all came together to the office of Karnes & Ess?

A. Yes, sir. I think in the meantime one went out, of course, to see to the Bank of Kansas City from Mr. Craig's office.

Q. One of them may have gone out in the meantime to see the Bank of Kansas City?

A. I think so.

Q. I understood you to say that in this conversation with R. A. Melone and C. H. Benedict—one or both of them—when you demanded security for your debt, that they appeared to be satisfied to do what was right in the matter?

A. Yes, sir.

Q. And they also stated that if your bank was secured the Bank of Kansas City should be secured?

A. Yes, sir.

Q. That was the first time that you heard of the existence of any debt to that bank?

A. Yes, sir.

Q. Now, did you understand that morning that J. B. Melone, of Macon City, was a member both of the Macon Savings Bank and of the Farmers' & Traders' Bank, and of the firm of Benedict, Melone & Co. here?

A. I knew he was a member of one of the banks, but

331 didn't know he was a member of both.

Q. And you anticipated that the failure over there would produce confusion in the business of the firm here, and for that reason, of course, you wanted to get secured?

A. Yes, sir.

Q. How long did you remain in the office of Karnes & Ess after you came here that morning?

A. We were here until one or two o'clock, as near as I can remember.

Q. You left before all the matter was arranged, didn't you, and went down to your bank?

A. I suppose they hadn't finished the papers, probably.

Q. Did you come back any more that evening?

A. I don't think I was back here. After I saw Mr. Ess at the bank that evening I didn't return to the office again.

Q. You further stated, Mr. Wilson, that the representation was made to you that morning by either R. A. Melone or C. H. Benedict, or both of them, that they were solvent—that is, the firm of Benedict, Melone & Co. was solvent, if they could go ahead without the complications at Macon City, if that didn't make them insolvent?

A. Yes, sir.

Q. That was about the substance of their conversation?

A. Yes, sir.

Q. It put you on your guard, and you wanted your debt secured?

A. Yes, sir.

Q. And afterwards, I understand you to say, that the statement was made over here that they would have probably as much as eighteen or twenty thousand dollars surplus, after payment of their debts—that is, Benedict, Melone & Co.?

A. Yes, sir; this firm here.

Q. Without regard to the Macon matter. Now, do you rec-
332 ollect any one in the office here besides R. A. Melone and C. H. Benedict, Mr. Charles Stewart, and Mr. Craig and Mr. Ess?

A. That is all, except Mr. Stonestreet.

Q. You said something of Mr. Cooper or Whipple coming afterwards; they merely came and retired?

A. Yes, sir.

Q. They were not present at any consultation?

A. They were not present during the drawing of the papers.

Q. Or any consultation of talks between Melone, Benedict, and you gentlemen?

A. No.

Q. Now, had you not, Mr. Wilson, either before or at the time of the institution of this attachment suit of Plankington & Armours, the first attachment, whatever it was—hadn't you about that time, or prior to it, heard of the probability of a large amount of this accommodation paper for which this firm might become liable under some contingencies?

A. I think not at that time. My recollection is that the attachments were brought shortly after Mr. Stewart took possession of the stock.

Q. I think you are right, but you had heard about that afterwards?

A. Yes, sir; but we didn't get into the merits of this case until some time after that.

Q. However, you had heard of the existence of this accommodation paper before this money was paid by Mr. Stewart to you, and you gave that indemnity bond?

A. Yes, sir.

Q. Was one bond given, or was there a separate bond from each bank?

A. Each bank separately.

333 Q. The bond given by the Kansas City Savings Association was signed by who?

A. By Charles Perrin and L. F. Wilson, and perhaps somebody else.

Q. Now, that bond was given, if I understand you properly, to indemnify Mr. Stewart against any loss or damage of any kind that might result to him by reason of the payment of this money paid to you under this deed of trust?

A. That was the reason.

Q. This indebtedness was not due; was that the case?

A. Some of it wasn't due. I would add that it saved the estate some interest by paying the Kansas City Savings Association at that time.

Q. In other words, you mean to say that Mr. Stewart had money in the bank, and by paying that money it saved the estate the interest that might have accrued on it if it hadn't been paid; that is what you mean?

A. Yes, sir.

Q. And part of this was due and part not due?

A. I think that is the case.

Q. At Mr. Craig's office, do you recollect, Mr. Wilson, whether there was any talk there of making a deed of assignment for the benefit of all the creditors, but preferring you gentlemen in that deed?

A. I don't know whether that conversation took place or not.

Q. Wasn't that same matter talked over here with Karnes & Ess, to make the deed of assignment and prefer the banks?

A. I cannot answer that question yes or no.

Q. You don't recollect these particulars?

A. No; I generally like for my attorney to exercise his judgment. I can't call to mind what their idea was. I got them up here as quickly as possible.

Q. Of course, your object was to secure your debt?

334 A. Mr. Craig not having a large practice here, I didn't know what his experience was. Karnes & Ess were the people we usually consulted with.

Q. So as to the real object in view by Benedict, Melone & Co. or by R. A. Melone and C. H. Benedict, or by the firm, what kind of disposition they wanted to make of their property and the reason of it you don't know and you don't pretend to say?

A. No; I don't know.

Q. You know this, that they concluded to make a deed of trust to you and the Bank of Kansas City and the Citizens' National Bank as preferred creditors?

A. Yes, sir; I think they deferred to our wishes. We could have attached at any time.

Q. Didn't you understand they were making disposition of all their property?

A. The firm here?

Q. Yes, sir.

A. No; I didn't understand they had done anything.

Q. That this firm was making a disposition of their property for the benefit of all their creditors; you understood that, didn't you?

A. Yes, sir; they were not covering up anything for their own benefit except after their creditors were paid. They wanted to turn over their property to satisfy their debts—that is, the debts of Benedict, Melone & Co., but not the debts of the bank. There is the point they wanted to make, to escape the creditors of the bank that had no claim against them.

Q. And to secure their own creditors?

A. Yes, sir.

Q. First paying your banks?

A. Yes, sir.

335 Q. As to the minutæ and the reasons why it was done this way or that way you don't know yourself; that was left to the attorneys?

A. Yes, sir.

Q. Is your bank a subscriber to the Bradstreet and Dunn Commercial Agencies?

A. They are at present.

Q. Were they then?

A. They were not at that time; that is my recollection. I don't think we had subscribed to those agencies at that time.

Q. You do now?

A. We do.

Redirect examination by Mr. Ess:

Q. Do you state, Mr. Wilson, that you were aware of a purpose on the part of Benedict, Melone & Co. to dispose of their entire property?

A. That I was aware?

Q. Yes, sir.

A. To the payments of their debts.

Q. To the payment of whose debts?

A. Benedict, Melone & Co.'s debts.

Q. What concern was trouble expected to come from, if any concern?

A. From attachments by the creditors of the Macon Bank.

Q. Then you were apprehensive of trouble from the bank creditors at Macon City.

A. Yes, sir.

Q. Not from the creditors of Benedict, Melone & Co.?

A. No.

Q. Were you aware that at the time they made the deed of trust they were going after that to make a voluntary assign-

336 ment or to do anything else except to get rid of the interest of James B. Melone.

By Mr. DOUGLASS: I object to that question as leading.

A. I don't know exactly how to answer the question. I know the position I felt they were in and the position they were really in; that the complications between James B. Melone and this firm would be such that it would annoy these people considerably. I had seen the same thing before in the failure of the Mastin Bank; creditors attaching everything belonging to stockholders; that James B. Melone's interest was the dangerous part of the whole transaction.

Q. Then it was James B. Melone's complications with the Macon banks that was causing trouble here, as you then understood it?

A. They would never have been disturbed if it hadn't been for J. B. Melone being connected with the firm here.

Q. You had no idea but that they were perfectly solvent at that time?

A. I supposed they were, and they pretended to think so. They told me they had means outside of their indebtedness of quite an amount if they could separate the bank from themselves.

Q. Did you hear R. A. Melone or C. H. Benedict or Mr. Craig or Ess say anything as to what Benedict, Melone & Co. were going to do before the deed of trust was made and delivered—as to what they would do after the execution and delivery of that deed of trust?

A. As to what they would do after the delivery of the deed of trust?

Q. Yes, sir.

A. I don't know as I did.

Q. Don't you know that I came up to the Bank of Commerce to see you to ask your consent to act for either Melone or Bene-
337 dict in determining what was to be done?

A. I have answered that.

By Mr. DOUGLASS: I object to the question as incompetent, leading, and immaterial.

Q. Did you ever know of any determination to execute a voluntary assignment on the part of either Benedict or Melone; did you ever know of any intention on their part to make a voluntary assignment for the benefit of all their creditors?

A. You mean at any time?

Q. Before the deed of trust was delivered?

A. No; I didn't know of any intention on their part to make a voluntary assignment before that.

Q. At the time that you were informed that the deed of trust had been delivered were you aware of what else was to be done?

A. No; I didn't know what movement would be after that.

Q. Then, is it true that before the delivery of the deed of trust you understood that Benedict and Melone were to dispose of all the property of the firm of Benedict, Melone & Co. in one transaction, including the deed of trust as part of it?

By Mr. DOUGLASS: I object to the question as leading.

A. My recollection of it was that their total assets were to be in the hands of Stewart, as trustee—first, to pay the banks; second, to apply upon their indebtedness to other parties, and, third, to return the residue to the individual partners.

Q. In other words, the partnership was to be wound up?

A. That is my understanding, that this deed of assignment would cover all the ground. I don't know that I ever read it or heard it read.

Q. Well, if this deed of trust was to cover all the ground and was to be all that was to be done, didn't it strike you that it was a little strange that I should come and ask your consent to act for them?

338 By Mr. DOUGLASS: I object to the question as leading.

A. That is taking the ground that the deed of trust covered the securing of the banks and the paying of their indebtedness and the residue going to the partners. You want to know if I didn't consider it strange, your coming?

Q. Yes, sir.

A. Well, I don't know whether I considered the matter at all. I supposed they wanted some counsel. They had everything they had on earth involved there.

Q. Were any other creditors embraced in that deed of trust except these three banks, Mr. Wilson?

A. I just said that I didn't know. I have forgotten whether I read it or heard it read. I don't know what the closing part of the articles is.

Q. You seem to state in your cross-examination, to give the idea, that you had this information that Benedict, Melone & Co. proposed by one act, the giving of that deed of trust and after that the making of a voluntary assignment and the procuring of a receiver; that all of these parts were to go together, making one act, and making an entire disposition of all their property; did you have that knowledge when this deed of trust was delivered?

By Mr. DOUGLASS: I object to the question for the reason that it calls for a conclusion from the witness and states a proposition which is not true, and as leading.

A. It is hard to answer this question when you don't know what the paper provided for. I can only say I secured my debt, but I cannot go beyond that to state what the rest of the facts were concerned in the paper, because I wasn't interested and didn't impress my mind with it.

Q. Did you, at that time, know anything else except that
339 you had got the deed of trust?

A. No; I have stated that—that of my own knowledge I didn't know anything else.

Q. You didn't know, then, what Benedict, Melone & Co. were going to do after the deed of trust was made?

A. No.

Q. And didn't care?

A. No; I was after getting my money.

Recross-examination by Mr. DOUGLASS:

Q. You didn't understand from either R. A. Melone or C. H. Benedict that they were going to give a deed of trust to secure your banks and then leave the balance of the property alone, making no further disposition for their creditors?

A. I didn't know the disposition of anybody's claims except the Bank of Kansas City and ours. Then Cooper came up and we included him in the trust. The further disposition of their property I didn't know anything about; I don't remember the disposition that was made.

Q. You didn't know what they did do with it?

A. No.

Q. Now, didn't you understand at the time that they were going to dispose of all their property—that was the intention—to fix it so it would go to the creditors of Benedict, Melone & Co.?

By Mr. Ess: I object to the question as calling for a conclusion of law.

Q. (continued). And intending to get rid of the creditors of the Macon Savings Bank?

A. That would be the natural conclusion from the facts, they being solvent, as they claimed; the creditors here, local, were to protect themselves against the creditors of the bank at Macon.

340 Q. You did understand, then, that they, Melone and Benedict, intended to dispose of all their property for the benefit of all the creditors of Benedict, Melone & Co. in some way?

A. I understood they wanted to see their debts paid.

Q. You understood they wanted to dispose of their property in some way for that purpose?

A. I had just as leave answer in your words. My understanding is they wanted—as the firm stood—they wanted the firm's debts paid and to rid themselves of the complications of J. B. Melone.

Q. But as — the manner in which this was to be done you have answered Mr. Ess that you don't know?

A. I don't know.

By consent of parties, Shannon Douglass, Esq., appearing for the plaintiffs and Henry N. Ess, Esq., appearing for the defendants, the taking of these depositions was continued by me until Thursday, April 10th, 1884, then to be continued at the place, between the hours, and in the behalf first aforesaid.

____ ____,

Notary Public, Jackson County, Missouri.

On Thursday, April 10th, 1884, the taking of these depositions was continued as follows, pursuant to adjournment, at the place, between the hours, and in the behalf first aforesaid.

HENRY N. Ess, being produced, sworn, and examined on the part of the defendants, testified as follows:

Direct examination by Mr. DEAN:

Q. State your name, age, residence, and occupation.

341 A. My name is Henry N. Ess; I live in Kansas City, Missouri; I am a practicing lawyer here, a member of the firm of Karnes & Ess, and have been since 1865.

Q. State what connection, if any, you had with the execution of the deed of trust by Benedict, Melone & Co. to Charles Stewart, trustee, for the use and benefit of the Kansas City Savings Association, the Bank of Kansas City, and the Citizens' National Bank. Give a history of what occurred in relation to the matter in your presence, and what you yourself did in relation thereto.

A. I had known James B. Melone at Macon city, Missouri, a banker and member of the firm of Melone & Epperson. Prior to the 16th of February, 1882, I had had no acquaintance with Charles H. Benedict or Richard A. Melone. On the morning of the 16th of February, 1882, Mr. Stewart came into our office and informed me about the failure of the banks at Macon City, Missouri. At any rate, he spoke of the failure of those two banks. I knew that James B. Melone was connected with one of them. He informed me that the firm of Benedict, Melone & Co. had begun to do business a short time prior to that at the Kansas City Savings Association, and that he thought the firm were indebted there, and that the failure of the banks at Macon City might affect the interest of James B. Melone in the firm here. I don't know whether I went to see Mr. Wilson or Mr. Wilson came to see me. At any rate, he informed me that he wanted his debt secured, the debt of that bank, which was to be done either by attachment or deed of trust or mortgage, and for a good while I was looking around for grounds for attachment. I went to Mr. Craig's office, and there, I believe, I was introduced to Mr. Benedict and Mr. Richard A. Melone. James B. Melone wasn't here. The parties were there talking of making a voluntary assignment, but had concluded to secure the Kansas City Savings Association.

342 Either one or both of them, Benedict and Melone, said that they were indebted to the Bank of Kansas City, and if they secured the Kansas City Savings Association they ought also to secure the Bank of Kansas City. We made no objection to that. From there we came to our office here, where we are taking these depositions. Mr. Craig came along, and we began to draw a deed of trust covering their property. The deed of trust included their notes, accounts, stock, and fixtures. I went around to the Kansas City Savings Association and got the notes and drafts that were to be secured, so that they could be copied into the deed of trust. I also saw Mr. Thornton, cashier of the Bank of Kansas City, and got from him the notes and drafts that were owing to that bank and brought them up here, and by that time it was about noon. While we were drawing the deed of trust Mr. Cooper or Mr. Whipple, I don't remember which, came up and stated that they had a debt there and they wanted it secured, and said that if we didn't propose to secure it in the deed of trust we were taking they proposed to secure it by attachment. No objection was made to putting their

notes and drafts in, and they were put into the deed of trust. During this time some discussion was had as to the standing and condition of the firm. We discussed what they had been doing, and from the conversation of the parties, perhaps from the book-keeper and the books, of the latter part I am not certain, we ascertained that the capital of the firm was thirty thousand dollars, and that the profits during the last year were nine or ten thousand dollars, and that there was no trouble apprehended from any source, except from the bank depositors and bank creditors of the Macon City Savings Bank—I cannot state the name of the other bank—the Farmers' & Traders', I believe. There was no apprehension of any trouble from any source except from them. The Mastin Bank
343 at Kansas City had failed and a large number of depositors had sued out attachments against the bank officers, and we were looking for something of the same kind against the officers of the banks at Macon City, and, of course, against James B. Melone, and that these attachments were liable to be levied on the interest of James B. Melone in the firm here. The proportion in which the capital was put in was some time discussed, and that was ascertained to be $22,500.00 for James B. Melone, $2,500.00 for Richard A. Melone, and $5,000.00 for Charles H. Benedict. This was the way in which the thirty-thousand-dollar capital was made up. The deed of trust was completed and read over to the parties—that is, Charles H. Benedict and Richard A. Melone. Richard A. Melone signed the firm name to it and acknowledged it, and then the deed of trust was delivered either to Mr. Stewart, the trustee, or to Mr. Wilson for him—that is, L. F. Wilson, vice-president of the Kansas City Savings Association. After the deed of trust was delivered Mr. Benedict told me he wanted us to assist him in their business. It may be that Mr. Melone made the same remark. I told him that I couldn't do so unless the Kansas City Savings Association would consent; that I was willing to do so by their consent. I immediately started to the bank to get their consent to act or to get their refusal to acting. When I got there the bank was closed. I tapped on the window and the door was opened, and I stated to Mr. Wilson, and, I believe, to Mr. White, that their debt had been secured, and that now the parties wanted me to act in their interest for something further to be done, I didn't know what.

By Mr. DOUGLASS: I object to that last part of the answer, the conversation with Mr. Wilson, as incompetent and immaterial.

A. Mr. Wilson or Mr. White said they had no objection
344 to my acting, and thereupon I returned to our office and so informed Mr. Benedict and Mr. Melone. They seemed still inclined to make a voluntary assignment. I made further inquiries as to their debts and liabilities, and after making due allowance they thought their capital, after all debts would be paid, including the bank debts here, would be from eighteen to twenty thousand dollars. James B. Melone wasn't here. I didn't see how we could make a voluntary assignment unless he were here to sign the deed. The deed would have to be sent to Macon City for signature by him.

I knew of no authority in the partners here to make a voluntary assignment for him. I am now telling what took place in our office. The matter of the assignment was discussed and the parties concluded not to make an assignment. One reason for it was that they would have to send the deed to Macon City to be signed and acknowledged, and another objection was that a solvent firm would have no business to make an assignment; and if they did there might be some question whether it wouldn't be fraudulent as to creditors, as tending to delay them; another was that the principal thing they wanted to do was to get rid of James B. Melone, and they couldn't do that under a voluntary assignment; and then I asked them as to the terms of the partnership, and the solvency of James B. Melone was discussed. I didn't know whether there could be any dissolution of the partnership at all. I inquired for written articles of partnership, as to how long the partnership was to run. We were informed that the partnership was at will; that there was no definite time that it was to continue. Under such circumstances we thought the better plan would be, and we so recommended the parties, that as James B. Melone had likely become insolvent, and as the partnership was at will, it could be dissolved at any time; that Mr. Benedict could file a suit for the
345 dissolution of the partnership, and could have a receiver appointed to take charge of the property; that the debts of the partnership could be ascertained and paid in that way, and the principal thing they wanted to accomplish could be done, and that was to ascertain the interest of James B. Malone and pay it over. That interest would be in court, and if any of James B. Melone's creditors in Macon or elsewhere wanted to get it they could come into court and do so. We were aiming all the time to avoid any delay and to avoid any sacrifice of the property and to avoid any appearance of anything wrong.

By Mr. DOUGLASS: We object to what they were aiming to do, as incompetent, irrelevant, and as stating a conclusion.

Q. Was this the expressed purpose of the petition at the time these transactions were had?

By Mr. DOUGLASS: I object to that question as leading.

A. In the first part of the day and up to the afternoon there was no expressed purpose to do anything except execute the deed of trust to secure these banks. Until that was concluded we didn't know what we were going to do. I had not inquired as to what the parties would do after that. After the execution of the deed of trust then I began to discuss the question for the first time as to what would further be done. We did just what the parties intended to do, and that was to file a bill in equity for the dissolution of the partnership and to have a receiver of the partnership property appointed, have the debts ascertained and paid, to take and state an account between the partners, and to pay over to each of the partners what he was entitled to. That is what we started out to do. The order of appointment was made by Judge Gill; that is of record. The

bond was not made until the next day. I think the next day after the receiver was appointed—perhaps in the afternoon—there
346 was one attachment for about $680.00, brought by Pratt, Brumback & Perry, as attorneys for Plankington & Armours, I believe.

By Mr. DOUGLASS: I object to that as being a matter of record.

A. We, as representing Mr. Stewart and Mr. Benedict, had no objection to the courts granting leave to garnishee Mr. Stewart as receiver, and made no objection to it.

Q. Did you give any permission?

A. No, sir; the permission was granted by Judge Gill. We didn't suppose we had authority to give permission.

Q. Did you go into court and admit, so far as your client was concerned, that you had no objection to his being garnisheed, provided the court permitted it?

A. No; I didn't go into court and say so. I think I informed the judge that if anybody thought we were engaged in any fraud he needn't hesitate about allowing attachments to be levied, so that the receiver could be garnisheed and we could test it.

By Mr. DOUGLASS: I object to conversation he had with the court outside as incompetent.

A. We continued to think that the firm would have at least from eighteen to twenty thousand dollars surplus for division among the partners until some time in March; it must have been the middle or latter part of March.

Q. Mr. Ess, state what information you had concerning the indebtedness of Benedict, Melone & Co. to the banks at Macon City, and the other debts for which they were bound, outside of those for goods purchased and money borrowed from the banks named in Kansas City?

A. We didn't, at any time, have any knowledge of any debts to the Macon banks, except five thousand dollars in amount that was on the books of Benedict, Melone & Co. Debts afterwards
347 came in from that concern to the extent of about fifty thousand dollars. That is a matter of record.

Q. What information did you have as to any accommodation paper for which the firm of Benedict, Melone & Co. were bound as accommodation acceptors, makers, or endorsers?

A. We didn't have any at that time and didn't have for a month or six weeks after the deed of trust was made, and at that time and for a long time afterwards we knew nothing about it. We defended the suits brought by the assignees of the two banks on the ground that there was no consideration for it at all. It was not on the books here and we knew nothing about it.

Q. When you say "we" who do you intend to include by that term?

A. I mean by "we" Mr. Stewart, myself, and Mr. Benedict and Mr. A. Melone, or any other person here. No one here that I

have ever found knew anything of this extra forty-five thousand dollars of indebtedness to those two banks.

Q. What statements, if any, did you have from Benedict or R. A. Melone concerning that indebtedness that was held by the banks at Macon City and in St. Louis, for which claims were afterwards made on the firm of Benedict, Melone & Co.?

A. The statement of R. A. Melone and C. H. Benedict and, I think, of the book-keeper were that the indebtedness to those banks was forty-five hundred or five thousand dollars. I had it in my head that it was forty-five hundred dollars, though I see now it was five thousand dollars.

Q. What statements, if any, did you have concerning the character of this paper which was held by the banks in Macon City and St. Louis, in addition to this forty-five hundred dollars of indebtedness or five thousand dollars of indebtedness which you have mentioned.

By Mr. DOUGLASS: I object to that question until it is made
348 more definite as to the time and place.

A. We had no statement from them at all about it. We knew nothing of it and never had heard of anything of the kind until the attachments began to come in, which was about the 8th or 10th of March. The banks' debts had all been paid off prior to the time that we had ever heard of anything of the kind—at least prior to the time that I had heard of it, and then when the debts were coming in we began to ascertain what they were; then the statements that they were all accommodation—that is, that there was no consideration for it.

Q. From whom did these statements come?

A. Benedict and Melone. We were some time discussing the question here whether we wouldn't withdraw the pleas in abatement and let them go—let them take the debts that way, so as to pay the real creditors here and let them go—whether that wasn't the easiest way to get rid of that debt.

Q. How soon did the trustee under the deed of trust take possession of the stock of goods?

A. He took it right away.

Q. State, if you know, whether — not Benedict and R. A. Melone contemplated, as soon as their complications with J. B. Melone were straightened up by the proceedings inaugurated by you, to commence business again in Kansas City.

By Mr. DOUGLASS: I object to the question as being leading, and also as stating a conclusion.

A. They expected to go on in business. The question was how it was to be done. They might have gone ahead without executing any mortgage or deed of trust at all, or without making any assignment, or without having a receiver appointed—gone ahead and ascertained it and paid it out. That was one of the things we
349 discussed, whether we wouldn't release the deed of trust after it was made. It wasn't filed of record until late that

afternoon. They could manage their own business better than anybody else could, and from the appearance of things they thought they could pay all of the debts inside of sixty days; but they thought that if they did that these persons might come in and levy on Jim Melone's interest, just like they did in the 26 Missouri, and that would make trouble; while, if they got his interest cut, his creditors, if they wanted to, could come in and get it.

Q. State at the time the deed of trust was given and the receiver appointed what surplus, if any, was there belonging to the firm of Benedict, Melone & Co. after all the debts were to be paid, if you knew, from an examination of the books made at that time or from the statements made to you by Benedict or Melone?

A. The capital was put down at thirty thousand dollars, and they had made nine or ten thousand dollars the year before; and we thought, allowing liberally for losses and expenses, they ought to have from eighteen to twenty thousand dollars. That is what they thought and continued to think for some time afterwards; that is what all of us thought; they did have money enough to pay all the debts they had on the books inside of sixty days.

Q. I will ask you to state when you saw J. B. Melone next after the receiver was appointed.

A. That was when he came here; it was the spring or fall term of court, in 1883, when we tried the case of the assignee of the Macon Savings Bank against Benedict, Melone & Co., to which Mr. Stewart, as receiver, was a party; when that was tried here I believe was the first time I saw James B. Melone.

Q. Did you have any conversation with him at that time?

A. I had conversations with him—yes—and he was on the witness stand.

350 Q. Did you have any conversation with him when he was not on the stand?

A. Yes, sir.

Q. I will ask you to state whether he then or at any time ever claimed that that deed of trust should have the effect of an assignment.

By Mr. DOUGLASS: I object to the question as incompetent, because there is no foundation for it, and also as leading.

A. I never heard any objection from James B. Melone as to what had been done at all in any way.

Q. State whether he at any time, in your presence or to your knowledge, has ever repudiated the action of his partners in executing the deed of trust to the banks of Kansas City.

A. I never knew of his taking any action in that respect at all. I don't think he has done anything.

Q. I will ask you to state whether R. A. Melone and Benedict ever stated to you that that deed of trust was made for the purpose of an assignment.

By Mr. DOUGLASS: I object to the question as incompetent, no foundation being laid for the question, and also as leading.

A. I have never heard from James B. Melone or Richard A. Melone or Charles H. Benedict any intimation that they wanted anything different done from what was done. Richard A. Melone and Charles H. Benedict determined that they didn't want an assignment. That question was brought up and settled. I have never heard that there was anything wrong about that.

Q. Just state what was done by you and Mr. Stewart respecting the payment of the indebtedness owing by Benedict, Melone & Co. to the three banks in Kansas City, for which the deed of trust is executed?

A. On the 7th of March there was enough money to pay these debts, and the banks demanded payment. Stewart had been
351 garnisheed in one case, the attachment being issued on the ground of a fraudulent disposition of the property, and I thought it would hardly be safe for him to pay the money over while he was garnisheed in such a case as that, and yet it would be treating the partners wrong to let these debts run on drawing interest, making about about a hundred dollars a month. Some of the debts drew ten per cent. interest, and on some no per cent. was expressed, and some one of the banks, and perhaps all, were threatening suit if it was not paid. I don't suppose they could have brought suit for the part of the debt not due, but to save interest, and at the same time make the trustees secure, I thought a bond of indemnity should be taken from the banks and payment made at that time. It would save about $1,200.00 a year, and I didn't know how long the matter might run. Accordingly, payment was made, I think, the next day to the banks—on the 8th.

Cross-examination by Mr. DOUGLASS:

Q. What time in the morning was it, Mr. Ess, that Mr. Stewart came to you and told you of the failure of the Macon banks, and that the Kansas City Savings Association was interested in the concern of Benedict, Melone & Co. here?

A. I think it must have been half past eight or nine o'clock in the morning. I was in my office when he came in, but I hadn't been here very long.

Q. Then, did you go directly to see Mr. Wilson, or did Mr. Wilson come to see you directly?

A. I don't remember which it was.

Q. You saw Mr. Wilson?

A. Yes, sir; I met Mr. Wilson pretty soon after that, and he was wanting to attach.

Q. Then, you went to Mr. Craig's office and from Craig's office you came to your office here?

352 A. Yes, sir.

Q. Was Mr. Wilson with you when you went to Craig's office; did he go with you to Craig's office?

A. I don't know now whether Wilson went with me there or not.

Q. Was the intention to prefer the Kansas City Savings Association and the Bank of Kansas City arrived at — Craig's office or in your office?

A. I think it was arrived at in Craig's office. I am not certain about that. We wanted a deed of trust to the Kansas City Savings Association alone. I didn't care anything about securing the Bank of Kansas City, but they insisted upon doing that themselves, and we had to put it in.

Q. Your object was to secure your client in the matter, representing the Kansas City Savings Association?

A. Yes, sir.

Q. And they wanted also to secure the Bank of Kansas City, to which you assented or had no objection?

A. I had to consent.

Q. You were not then the attorney of the Bank of Kansas City?

A. No, sir; I was not then and never have been.

Q. Mr. Craig came up with you—Henry Craig?

A. Yes, sir. I don't know whether he came with me; he came up here. Charles H. Benedict came here, Richard A. Melone was here, and Stewart and Wilson; how they got in I don't know—whether it was all at one time or not. I don't think it was all at one time.

Q. You then went to see the Bank of Kansas City, didn't you, to get their claims against the firm of Benedict, Melone & Co. in order to secure them in this deed of trust?

A. Yes, sir.

Q. Do you recollect who gave the claims to you there?

A. I am pretty certain that I saw Thornton and got them from him.

353 Q. The cashier?

A. Yes, sir.

Q. Did you explain to Mr. Thornton what you wanted with the claims; you had some conversation with him, didn't you?

A. Yes, sir.

Q. What did you tell him?

A. I told him what we were going to do; that we were going to take a deed of trust to secure these debts.

Q. Did you also state to Mr. Thornton or did he seem to know at that time of the failure of the Macon banks or either of them; was it talked over between you?

A. We didn't talk it over. I just wanted the notes, to put them in the deed of trust.

Q. You gave Mr. Thornton to understand that there was some trouble here; that your bank was being secured, and that the parties wanted to secure his; he understood that?

A. Yes, sir; he knew there was going to be a deed of trust to secure the debt of Benedict, Melone & Co. to his bank, and the Kansas City Savings Association.

Q. You say you don't recollect the full conversation between you and Mr. Thornton, what was said exactly there, at the time you got the notes?

A. I didn't tarry very long. I only told him enough to get the notes or drafts, whichever it was. It was the obligations of Benedict, Melone & Co. to that bank.

Q. Which was incorporated into this deed of trust? Now, about what time was it when the deed of trust was completed; what time of the day?

A. The deed of trust was completed in the afternoon; I suppose between three and four o'clock.

Q. About what time was it that Mr. Whipple or Mr. Cooper came up here?

354 A. That was about noon.

Q. Whichever one it was that came up said that their paper must be secured or they would attach; wasn't that your statement?

A. I think these statements were made to me. I know there was a threat of attachment made and I know they demanded that their debt should be secured.

Q. Then Benedict, Melone & Co. agreed to secure them also with the Bank of Kansas City and the Kansas City Savings Association, and the deed of trust was drawn up, as before stated?

A. Yes, sir; we had, I think, partly drawn the deed of trust and had to change it some.

Q. You put in the Citizens' National Bank?

A. Yes, sir.

Q. You say the deed of trust was completed about four in the afternoon?

A. Yes, sir.

Q. You couldn't have drawn very much of it?

A. We had drawn part of it, I know; I don't know whether we went on with the same deed of trust or took some other paper.

Q. Anyhow, you arranged to incorporate their indebtedness with the other?

A. Yes, sir.

Q. Now, at this time did you undertand that Craig was representing Benedict and Melone or not; who did he claim to be representing; what was he doing here?

A. I understood that Mr. Craig had been the firm attorney of Benedict, Melone & Co. and was at that time.

Q. You didn't at that time claim to represent Benedict and Melone or the firm of Benedict, Melone & Co.?

A. No, sir; I was representing the Kansas City Savings Association.

355 Q. And your object was, of course, to secure that interest, and you represented no other interest?

A. My idea was to secure that debt; nothing had been said to us about acting for them. I had no idea we were going to act for them or in their interest; no one had talked of it or thought of it.

Q. You understood from them at the time the deed of trust was drawn, or about that time, and also in Craig's office, as you have before stated, that they wanted to make an assignment for the benefit of all their creditors?

A. Yes, sir; that is what they were going to do down at Mr. Craig's office.

Q. And they talked about it, even after the deed of trust was made?

A. Yes, sir.

Q. And reasons were given here why it wasn't possible to make the deed of assignment, and the conclusion was reached as you have stated in your examination-in-chief?

A. Yes, sir.

Q. After the execution of this deed of trust was the paper turned over immediately to Mr. Wilson or Stewart or held here in your office; what is your recollection about that?

A. I don't know what time the delivery of the papers took place.

Q. You don't recollect?

A. I do not.

Q. Did you go out to see Judge Gill that evening to have Stewart appointed receiver?

A. Yes, sir.

Q. What time was that?

A. I went out to see him at his house; I got a hack; it was after dark.

Q. You had Mr. Stewart appointed receiver and came back?

356 A. Yes, sir.

Q. Did you take the appointment down to the clerk's office that evening?

A. No, sir; I took it on the next day, and I think it was entered on the minutes of the preceding day—entered on the minutes of February 16th.

Q. Do you know what time the deed of trust was taken to the recorder's office that evening or who took it there?

A. I know it was delayed some time; I don't know for what reason. It was filed during that day; my impression is that it was not filed until after dark.

Q. And you don't know who filed it or the exact time of filing it other than the record on the back?

A. No; I have an impression that L. F. Wilson filed it or took it down for filing it.

Q. L. F. Wilson was the vice-president of the Kansas City Savings Association?

A. Yes, sir.

Q. Now, you stated that after this deed of trust was drawn up you went to see Mr. Wilson and stated to him that it had been drawn, and asked his permission, or the permission of his bank, to represent Mr. Benedict in any other proceeding that might be had thereafter, or did you state to him exactly what proceedings had been resolved upon then?

Q. After the deed of trust had been drawn up, signed, acknowledged, and delivered, then Mr. Benedict or Mr. Melone, or perhaps both of them, wanted me to act further in their interest, and then I told them that I would have to go to see the bank, as Mr. Wilson had gone. I don't know how long it was after the deed of trust had been drawn, but it was shortly afterwards. And then I went up

357 to the bank and saw Mr. Wilson; when I went there the bank was closed; I had to tap on the window to get them to open the door so I could get in.

Q. You haven't yet answered the question exactly, when you went to see Mr. Wilson, whether you told him then that a receiver had been resolved upon to wind up the matter, or whether you simply told him that you had gotten the deed of trust securing the bank, and that you wanted permission then to represent Benedict and Melone in any other matters that might be resolved upon for them?

A. I certainly didn't tell him that we had resolved upon having a receiver appointed, because we hadn't done it; it wasn't a fact. I told him they wanted us to act in their interest in getting rid of the interest of James B. Melone, if anything further was necessary to be done at all.

Q. And his consent for you to do so was given as stated in your testimony?

A. Yes, sir.

Q. Now, Mr. Ess, did Mr. Benedict pay you any retainer?

A. He did not.

Q. Did you ever charge him any?

A. Yes, sir. I charged it on the books, but it wasn't long until it turned out that this forty-five thousand dollar debt was sued on, and it wasn't going to pay anything.

Q. Then you have never collected any fee for your services?

A. No; I never collected any fee from Benedict and never demanded any.

Q. Your representation has been for Mr. Stewart, the receiver, in all these matters, since that time?

A. The representation has been in this way: we were attorneys for Mr. Stewart, and we also filed pleas in abatement.

Q. For whom?

A. That we did for James B. Melone, Richard A. Melone,
358 and Charles H. Benedict, still supposing that the whole thing would close out in a short time. We soon ascertained that it was rather doubtful whether it would close out, and then Mr. Stewart obtained leave to defend the attachments, and they were defended on his account.

Q. Were you ever employed by James B. Melone; did he ever write to you to employ you?

A. James B. Melone never wrote to me to employ me. Mr. Benedict and Mr. R. A. Melone told me to put in pleas in abatement.

Q. You did so?

A. I did so. They are all sworn to, either by Charles H. Benedict or R. A. Melone.

Q. You had no conference with James B. Melone at all?

A. No, sir; not as to defending the attachments.

Q. You don't know whether he was served with process in the attachment suits or came in voluntarily, do you, of your own knowledge?

A. My impression is that the parties came to us, and we told them that pleas in abatement would be put in without the necessity of sending to Macon City for service. I don't know whether it was served there or not. My impression is that they were not.

Q. You say that the representations made in that conversation there

with R. A. Melone and C. H. Benedict were that J. B. Melone had put in about twenty-two thousand dollars of capital, C. H. Benedict five thousand, and R. A. Melone twenty-five hundred.

A. No; it was James B. Melone twenty-two thousand and five hundred dollars, Richard A. Melone twenty-five hundred dollars, and Charles H. Benedict five thousand dollars.

Q. Making a capital stock of thirty thousand dollars?

A. Yes, sir.

Q. The interest, then, of James B. Melone, according to the
359 statements made that day, appeared to be a good deal larger than that of the other two members of the firm?

A. Yes, sir.

Q. And you knew that the failure of the Macon banks would necessarily produce an effect upon his interest here?

A. Yes, sir; at least I thought it was liable to do that from the experience we had had with the Mastin Bank and First National Bank.

Q. Now, Mr. Ess, you say that after the deed of trust was made that day, during the afternoon, perhaps, before it was placed upon record, after talking with the parties—that is, with Benedict and Melone, about their condition, the assets they had, and the liabilities, as you understood them from them, that it was talked about that maybe they might go on in business and there would be no occasion for giving this deed of trust at all. Do you recollect the full extent of that conversation and who was present—whether anybody representing the Bank of Kansas City or the Citizens' National Bank or the Kansas City Savings Association was present?

A. None of them were present.

Q. That was simply a conversation between you and these parties after you had consented to act for them?

A. Yes, sir; as to whether we couldn't go ahead and wind the concern up and take the account of James B. Melone from the books and pay it over to him.

Q. The Bank of Kansas City, so far as you know, nor the Citizens' National Bank nor the Kansas City Savings Association never entertained any idea of releasing the security they had by reason of this deed of trust?

A. They knew nothing about it; that was something to be proposed to them or might be proposed to them. We were discussing its feasibility.

360 Q. But that was not communicated in any way to any of the beneficiaries in the deed of trust?

A. No, sir.

Q. And no assent or dissent was had from them about it? You stated in your examination that at the outset, after Benedict and Melone came to your office, Mr. Wilson being present here, that there was no expressed purpose except to execute a deed of trust for the benefit of these banks; that was the only expressed purpose—you stated that?

A. I said there was no expressed purpose or any other kind of purpose whatever.

Q. Hadn't they intimated that they wanted to make a deed of assignment?

A. They had down at Craig's office, and they may have talked about an assignment here, too.

Q. But they did agree on the purpose to secure the banks?

A. Yes, sir.

Q. And that purpose was executed in the deed of trust made that day?

A. Yes, sir.

Q. After the execution of this deed of trust Benedict and Melone remained in this office until the further proceedings resulted in the drawing up of the papers, the petition for the appointment of a receiver; is that the case; they didn't go outside?

A. I don't think they did. The most of the time was consumed in determining what we were going to do. The mere drawing of the petition didn't require much time. It was a short petition.

Q. And immediately after the execution of the deed of trust you were asked by either Mr. Benedict or Mr. Melone, or both of them, to represent them in further proceedings?

361 A. Yes, sir; I say immediately. I don't know how long it was. It was during the same day and during the same afternoon. I don't think it could have been more than an hour.

Q. You mean after the deed of trust was executed?

A. And delivered; yes, sir.

Q. You have no recollection, you say, of their leaving your office that evening until the other paper was prepared—that is, the petition for a receiver, and that course resolved upon?

A. They may have been out. I advised this receivership, and they must have been here to consent to it.

Q. Who went with you to Judge Gill, do you recollect?

A. Mr. Craig.

Q. Who did he represent out there, anybody?

A. Richard A. Melone and James B. Melone, the defendants in the case.

Q. Did he ever represent them afterwards, so far as you know, in this matter or any proceeding connected with this receivership or the affairs of Benedict, Melone & Co.?

A. Yes, sir.

Q. When?

A. I think it was at the time—I am confident it was at the time the decree was taken for dissolution. I suppose he represents them in the case. I have never been informed to the contrary.

Q. He represented them when the decree was taken in this suit that was instituted for the appointment of a receiver, the distribution of the assets, &c.?

A. Yes, sir.

Q. You understood and believed from the representations made by C. H. Benedict and R. A. Melone or one of them that the firm of Benedict, Melone & Co. was solvent, able to pay its liabilities,

362 and would have a surplus of from eighteen to twenty thousand dollars for distribution. This, in brief, was your statement?

A. I mean to say that these representations by Benedict and Melone were the only representations that we had. From what I could gather that was the fact; that they were worth from eighteen to twenty thousand dollars above all their liabilities after making a very liberal allowance for loss in winding up.

Q. You understood and knew, of course, that the firm creditors of Benedict, Melone & Co. would have to be paid out of their property before the creditors of the Macon banks could possibly secure any interest therein, either by attachment or otherwise, as to J. B. Melone's interest?

A. I don't know whether I knew that then. I don't know that I know it now. The bank creditors were liable to have attachments issued against James B. Melone, levying on this individual interest in some part of the stock and have it sold, as our supreme court has decided in the 20th Missouri. I didn't know but that perhaps we might take steps to prevent a sacrifice, but I didn't want anything of the kind to occur. It was to avoid litigation of that kind that we took the proceeding we did, in part.

Q. You knew, then, and understood the fact to be, that it was impossible for the creditors of the Macon banks to secure any benefit out of the firm property here until the firm debts were paid off if an effort was made on the part of these creditors to prevent it?

A. I thought the first effort would have to be made on the part of Benedict and Melone. I didn't know of any better way to do that than to wind it up, if they could wind it up.

Q. As a matter of fact, didn't you advise your client and also Benedict, that day when the discussion was had, as to the best
363 thing to do in the complications that ensued by the failure of the Macon banks; that Benedict, Melone & Co. were solvent and able to pay their debts; that all the creditors would be secured ratably by means of the receivership, and any litigation by which the funds of the firm here could be reached on the part of the creditors of the Macon banks would be by this means avoided; was any such advice given by you that day or any such talk had?

A. I had no talk with the Kansas City Savings Association people or any bank people about any receivership or assignment or anything else, except to ask the consent of the Kansas City Savings Association to act for Benedict or Melone or, perhaps, both; and as to the distribution of the firm property, that was a side issue. The principal thing was to get rid of James B. Melone's interest, who had become insolvent by reason of his complications with the Macon banks, and the idea was to have an account stated and taken between the partners, and in order to do that we had to have the debts paid, and almost the entire discussion was how Charles H. Benedict and Richard A. Melone could get their interests out of that or get James B. Melone's interest out of that.

Q. When the subject was being discussed and the representations made from which you and your client believed or were led to believe that the firm of Benedict, Melone & Co. were solvent, why did you not advise your client to risk their debt, along with the other creditors of Benedict, Melone & Co., in the receivership, which would

have resulted in the payment ratably of all the firm's creditors? In other words, if the firm was solvent what was the necessity for the execution of the mortgage preferring the banks here as against the other creditors?

A. At the time the deed of trust was drawn, securing debts
364 of the three banks here, after talking with Benedict and Melone I was satisfied that they might go along in business the same as they had done before and pay the debts as they matured. I consulted with them and they thought they could pay off their debts as they matured; but Benedict and Melone were uneasy about trouble coming from the Macon Bank creditors, and so was Wilson uneasy about trouble coming from the Macon Bank creditors, and if it did come in the form of attachment, as they had done with the Mastin Bank, then the entire stock would be taken on an attachment against one of the partners, and then there would have been a sacrifice.

Q. Now, how did you expect to prevent the same thing occurring by the execution of the mortgage securing these banks unless a further disposition of the firm property was made, as you knew that the bank debts wouldn't, in the nature of things, consume all the property of the partnership which was included in the deed of trust?

A. The first thing Wilson wanted done and the only thing he wanted done was to have a deed of trust on this property. He wanted security. The matter of what was to be done after that wasn't discussed, and whether anything was to be done after that wasn't discussed until after the deed of trust was made. Then we were discussing the question whether we would do anything at all or let it remain that way. While it was in the hands of Stewart, as trustee for these debts, I didn't see how any attachments could come in and displace it or take it from the possession of the trustee, and if there was a garnishment that would be all well enough, because then Stewart, the trustee, would go ahead and sell the goods. Benedict and R. A. Melone wanted their interest out, and they could get out by letting it run under the trust deed and taking the account themselves without going into court. The conclusion was
365 that if any account were made between themselves the bank creditors might say there was some fraud about it; that James B. Melone was entitled to more, and it was for that reason we concluded to let it go into court, and any creditor could come in and take part in stating the account.

Q. In other words, then, the object of the Kansas City Savings Association, as represented by you at first, was merely to secure its debt, and you were not taking care of what might be left after the payment of the preferred debts?

A. It was the first object and the sole object and the only object, and the only purpose of the Kansas City Savings Association was to get their debt secured. We paid no attention to what was to be done afterwards. We knew nothing of what was to be done afterwards.

Q. Then the fact of any representations being made on the part

of Benedict or Melone or anybody else as to their solvency cut no figure with the Kansas City Savings Association or the other banks in demanding this security?

A. I don't know that they cut any figure at all. I was merely making inquiries about that with reference to seeing whether there had been a fraudulent contracting of this debt; whether they had come in there representing that they had a capital of thirty thousand dollars, and had made a profit of ten thousand dollars, and had made this debt by any such representations as that, when they would turn out to be really insolvent. That was the purpose of making the inquiries as to their solvency prior to the time the deed of trust was completed; if they had turned out to be insolvent I don't know that we would have refused to take the deed of trust.

Q. That was not discussed?

A. No, sir; we wanted security.

366 Q. Then the Kansas City Savings Association and the other banks wanted deeds of trust because they didn't know of the solvency of Benedict, Melone & Co. and wanted to be secured; ain't that the fact?

A. All I can say about that is that James B. Melone was connected with the Macon banks that had failed. We had had considerable experience with the Mastin Bank officers, and they were apprehensive of trouble from that source, and they wanted security on the firm property here.

Q. They didn't rely on the fact that the firm here was solvent as to whether they would or would not ask for security, and as to whether they would or would not attach? Hadn't Mr. Wilson, before any representations were made on the part of either Benedict or Melone, consulted with you with reference to their securing his claim or attaching?

A. Mr. Wilson consulted me about securing his claim either by deed of trust or mortgage or by attachment. Just at what particular time that was, with reference to his going down to see them, I don't know.

Q. Was it before you went down and saw them at Craig's office?

A. I think I had seen Mr. Wilson before I went to Craig's office.

Q. Then the representations that you heard from Mr. Benedict or Melone were after that time; any representations you heard from either of them was after you had gone down to Craig's office?

A. All the representations I heard from Benedict or Melone was after I went to Craig's office, for the reason that I had never seen Richard A. Melone or Charles H. Benedict prior to that time. I was introduced to them at Craig's office.

Q. Were any books exhibited, Mr. Ess, by either Benedict or Melone showing their condition as to solvency or insolvency?

367 A. I don't remember of examining any books with reference to any particular accounts, and I cannot state now what particular books were examined by me. I am positive that books were looked at during that day.

Q. In your office?

A. I don't know whether it was in the office or up at that store.

I think I must have had some conversation with the book-keeper.

Q. Did they, Benedict or Melone, have any books here in your office in the presence of Mr. Wilson when any representations were made as to their condition?

A. I don't think Benedict or Melone had any of their business books down here.

Q. Now, what time were you up at their business house before they came to your office here from Mr. Craig's office, or afterwards?

A. I think it was after.

Q. What is your recollection as to the time?

A. It was afterwards, in the afternoon. If I went up to their business house and talked to their book-keeper it must have been after the deed of trust was made.

Q. Whether you did go up or not you are not positive?

A. I am pretty confident that I heard something from the book-keeper with reference to the debts and liabilities and the assets and resources of the concern.

Q. Now, whether that was that day or the day subsequent to it you don't know, do you, positively?

A. No; but I am pretty confident that it was during that day.

Q. Do you recollect who their book-keeper was?

A. I don't know what his name was now.

Q. You didn't pretend to make any examination of the books,
368 however, to know what the actual condition of things was?

A. No, sir; I did not. I had understood that Mr. Richard A. Melone had kept the books prior to that time, and I supposed that he knew. I had no idea or supposition that they would mislead or misrepresent anything.

Q. I understand you to say, Mr. Ess, that the only reason why it was not deemed best to make an assignment was that you understood the firm to be in a solvent condition, and it was discussed among you that perhaps an assignment of solvent persons might tend to hinder and delay creditors, and thus give ground for attachments, and was one of the reasons that was talked about?

A. I am confident I had that reason in my mind at the time, and I am confident I must have spoken of it.

Q. Now, will you please state, on the supposition that the firm here was solvent at the time, how much better the condition of the creditors became by the preference secured and the receivership; what was the difference; how was the situation changed?

A. One was executing a mortgage to secure their debts. They had a right to do it even if they were solvent. That is what I understood.

Q. In other words, you reasoned that the deed of trust would secure the debts, whether they were solvent or insolvent, and the receivership would dispose of the balance of their property?

A. You make that continually wrong, Mr. Douglass, in saying that the receivership would dispose of the rest of the property. The object of the receivership was to ascertain the debts and pay them, and take an account between the partners what was due to them.

Q. I understand that.

369 A. The form of the question seems to imply that the receivership was a means of paying the debts.

Q. That is what I am asking. You are answering and I am asking on that basis. Their creditors, then, would not have been hindered or delayed, so far as their debts were concerned, by the execution of this preference in favor of these three banks; is that so?

A. I don't think it would be such a delay as would be any occasion for the attachments; the creditors were all satisfied up to the time these debts were paid off, and it was only when we ascertained of the Macon bank debts running up to the extent of fifty thousand dollars that nobody knew anything about; it was only then that attachments were commenced, with the exception of the six hundred and eight dollar claim of Plankington & Armours.

Q. How do you know, as a matter of fact, that the creditors were satisfied with that deed of trust, or with the fact of the preference which had been given; you never talked with them?

A. I talked with a great many of them.

Q. Those you talked with seemed to be satisfied?

A. Yes, sir; nobody made any objections.

Q. For the reason that no objection was made, if I understand you, prior to this time; you think the creditors were satisfied with the preference?

A. The creditors were satisfied with the preference, and were satisfied with the security by the deed of trust. I heard no creditor make any objection, unless it was Judge Brumback, in that suit brought for Plankington & Armours. Everybody supposed that everything would be paid out in sixty days, and it would have been if the debts had been as we supposed they were and as we

370 represented to the creditors; the last dollar would have been paid inside of sixty days after the deed of trust was made.

Q. You were representing that, on the part of the receiver—that is, the fact that the debts would be paid within that period?

A. Yes, sir.

Q. That was on the supposition that you have stated, that this paper for which Benedict, Melone & Co. have been held liable by judgment in favor of the Boatman's Savings Bank, Donnell, Lawson & Simpson, the St. Louis National Bank, and the Macon City banks didn't exceed five thousand dollars; is that correct?

A. No, sir. I don't know what time it was we first heard of the debts due to the Boatman's Savings Bank, the St. Louis National Bank, and to Donnell, Lawson & Simpson, and to some other bank here, in Missouri, the Farmers' Bank of Bowling Green; but the debt to the Macon Bank was put down as being five thousand dollars; after these debts were coming in and were proved to have been notes held by the Macon Savings Bank, amounting to some fifteen thousand dollars, we still supposed we could pay out and have a surplus left then.

Q. You mean these debts, exclusive of the Macon banks; that is what you mean?

A. I mean the debts that had come in for fifteen thousand dol-

lars—I believe that fifteen thousand dollars is about the amount of them—to the St. Louis National Bank, the Boatmen's Savings Bank, and to Donnell, Lawson & Simpson, and some fifteen hundred dollars to some bank in Missouri.

Q. That didn't include anything due the Macon Savings Bank at all?

A. No; when we ascertained that there was fifteen thousand dollars out, we had no idea that there was thirty thousand dollars more back.

371 Q. What time did you ascertain the existence of this fifteen thousand dollars; how long after the appointment of Mr. Stewart receiver?

A. I don't know how long it was after he was appointed and I don't know how long it was after the deed of trust had been paid off, but it must have been the latter part of March. You see the attachments all stopped about the 20th of March. Then Peak & Yeager began their suit to have the deed of trust declared an assignment.

Q. You didn't attach on the claims of Donnell, Lawson & Simpson and these two banks; they were ordinary suits without attachment?

A. Yes, sir.

Q. You brought them?

A. Yes, sir.

Q. As to whether Mr. Stewart received any communication from Mr. Ruby, assignee of the Macon Savings Bank, or Mr. Wilson, assignee of the Farmers' & Traders' Bank, at Macon, about their claims before the middle or last of March, you don't know, do you, of your own knowledge?

A. No; I don't know.

Q. You mean you never saw any letters or communications, did you, to Mr. Stewart?

A. No, sir; I know that when Mr. Stewart did hear of it at first he made loud complaints about and threatened to resign, saying he had been deceived in it and didn't want to go ahead.

Q. Now, Mr. Ess, you have stated that you thought the deed of trust was delivered over to Mr. Wilson or Mr. Stewart. Now, have you any distinct recollection on that subject, as to whom the deed of trust was delivered?

A. No; I have not.

Q. Do you know who carried the deed of trust to the re-

372 corder's office for record; you didn't, did you?

A. No, sir; I did not. I told Wilson to do it.

Q. Whether he did or not you don't know?

A. No, sir.

Q. Who carried the appointment of the receiver and copy of the petition to the clerk's office?

A. I did. I think Mr. Craig was with me at the time. I went up and gave it to Jim Chase, deputy clerk.

Q. You gave it to him that evening?

A. Yes, sir.

Q. And he seems to have marked it filed as of the 16th?

A. Yes, sir.

Q. About what time in the evening did you give it to him, do you recollect?

A. I don't know; it was after dark.

Q. You stated in your direct examination that you advised the taking of a bond of indemnity by Mr. Stewart from each of the banks, partly for the reason that an attachment had already been sued out here, and supposing, perhaps, that other attachments might be issued; that is correct, is it not?

A. I don't think we supposed then that any other attachments would be issued. We had no reason to believe so.

Q. I thought you stated that?

A. If I did so state it is a mistake.

Q. State it over again, then.

A. The reason for taking the bond of indemnity was this: One attachment had been sued out attacking the deed of trust as a fraudulent conveyance within the attachment law.

Q. Did it mention the deed of trust?

A. No, sir; it did not; it followed the language of the statute. Another was that it was a payment by Stewart as trustee, while
373 he was acting as trustee and receiver both, and we didn't know whether the court would approve his action. We had asked the judge of the court about paying it over, and he told us that he couldn't determine anything in advance. We didn't know what attack might be made on it, and we couldn't get any order about it at all. Another reason was that the debt would be drawing interest at the rate of about twelve hundred dollars a year, and if we only stopped it for one month there would be a hundred dollars saved, and the partners wanted everything they could get, because the two together were not going to get over six or seven thousand dollars out of it.

Q. Then there was no order of the court for the payment of this money by Mr. Stewart, as trustee, to the banks?

A. No, sir.

Q. He did it of his own mind, taking a bond for the reason you have stated?

A. He took a bond securing it.

Q. Did Mr. Stewart remain in your office here after the execution of the deed of trust?

A. I think he did; I am not positive of that; I am pretty confident he went away before we had concluded on what we were going to do.

Q. As to how long he stayed in you are not positive?

A. No, sir.

Q. Did he go out to Judge Gill's with you?

A. No, sir; he did not.

Q. As to when he took actual possession of the goods mentioned in the deed of trust you don't know of your own knowledge—you didn't go with him?

A. I am pretty confident he took it that afternoon—got the keys.

374 Q. You don't know yourself when he went there and took possession?

A. Well, I didn't go there with him. I started him out, anyway, to get the keys.

Q. As to whether he got the keys and took possession you don't know?

A. No; I saw him there the next day.

CHARLES STEWART, having been duly sworn as a witness for the defendants, testified as follows:

Direct examination by Mr. Ess:

Q. What is your name?

A. My name is Charles Stewart.

Q. Where do you live?

A. Kansas City, Missouri.

Q. Where did you live before coming to Kansas City?

A. Well, I lived at St. Joe, Missouri, before I came here.

Q. State whether you ever lived at Macon City, Missouri.

A. Yes, sir.

Q. State whether you were in business there.

A. Yes, sir.

Q. How long have you known Richard A. Melone, Charles H. Benedict, and James B. Melone?

A. I believe about twenty years; that is my recollection about it.

Q. Where were they in business in 1881?

A. In Kansas City, Missouri.

Q. All three of them?

A. Yes, sir; that is my understanding; I guess all three were together in 1881.

Q. James B. Melone didn't live in Kansas City in 1881?

A. No, sir.

Q. What was the firm here—what was the firm name in 1881?

375 A. I think in 1881—the first part of it—it was Benedict, Crouse & Co, and then it was changed to Benedict, Melone & Co.

Q. The firm was composed of James B. Melone, Richard A. Melone, and Charles H. Benedict, latterly?

A. Yes, sir.

Q. What business was James B. Melone engaged in at Macon City?

A. At the time he was president of the bank down there—acting as president and cashier too, I think—the Macon Savings Bank.

Q. And he was also connected with the Farmers' & Traders' Bank?

A. Yes, sir; he was a director of the Farmers' & Traders' Bank; that is my understanding.

Q. The Farmers' & Traders' Bank was a copartnership, or do you know?

A. Yes, sir.

Q. Who managed the business of Benedict, Melone & Co. at Kansas City?

A. R. A. Melone and C. H. Benedict.

Q. What was the first intimation you had of the failure of the Macon banks?

A. The first intimation that I had was that Mr. Dick Melone—R. A. Melone—came up to my house on the morning of February 16th, 1882, before I had had my breakfast, and rung the bell. I took him in. I saw that he was laboring under some great excitement or other. I didn't know the cause of it. I had no idea of it. I supposed he had lost his wife or one of his children or something of that kind; and after he took a seat in my parlor I asked him—says I, Dick, what is the matter? Well, said he, Charley, the Macon banks are gone up. I told him I regretted it very much. Well, he said it not only affected them down there, but that it affected the firm up here; and I asked him in what way. I don't recollect about that, but he said a messenger had come up here; but I couldn't
376 swear about that. A messenger or telegram or something came up. I understood afterwards it was a messenger. The message was from J. B. Melone, cashier of the Macon Savings Bank and a partner of this firm here, and it was to the effect that the banks were gone up there at Macon, and that he wanted the boys, as he called them, to protect themselves—that is, he wanted to protect the mercantile creditors of Benedict, Melone & Co. in preference to having any attachments run by his creditors at Macon on this stock here. He expressed a wish for me to act—that is, to take charge of the stock in any manner I thought proper, as assignee or receiver, he didn't know what—that is, he wanted the stock out of their hands, so it couldn't be attached by the creditors of the banks down there. I told Melone that I would go down with him and see about the things. Well, he was crying when he came to me. On the road down I asked him who his attorneys were, and he told me H. H. Craig; and on the road down I asked him the condition of his firm up here—how it stood. He told me the firm up here had made money all the time, and that they must be certainly twenty thousand dollars ahead after everything was paid. Well, we talked about the thing on the way down, and I told him if they were ahead so much it seemed that there might be some way. He said his brother had sent up here and wanted some kind of an assignment made, and that he wanted to secure the creditors of Benedict, Melone & Co. in preference to the creditors of the bank coming up and attaching any of the stock of Benedict, Melone & Co.; and we talked about it a good deal and I refused to take it. I told him that I was in delicate health and didn't want to be bothered with it; and he insisted on it; and when we got down to Craig's office we met Mr. Benedict down there, too, and he insisted, too, that I take charge of it in some capacity—that is, take the stock so that—wouldn't be liable to any of the creditors of J. B. Melone or

377 anybody else down at Macon—that is, the idea seemed to be that they wanted to protect the creditors up here first, but I still refused to have anything to do with it. Finally Mr. Benedict and Mr. Melone both insisted so strongly on it that I asked them to let me go and consult my lawyers first. I told them I wanted to go and consult Karnes & Ess about it, as I knew them and didn't know Mr. Craig, and I came up to see Mr. Ess, and told him just the way they had reported it to me, exactly. Mr. Ess told me first he didn't think they ought to make any assignment or anything of the kind. That is my recollection about it.

By Mr. DOUGLASS: I object to what Mr. Ess told him.

A. And we went down there anyhow and had another talk about it, and I asked them at that time; said I, Don't you owe the Kansas City Savings Association up here? They told me yes. I told them I had recommended them to credit at the bank, and they said yes. Well, now, said I, if I do anything with this I don't want to take it, but if I do, you say you have got a surplus of about twenty thousand dollars; and they also told me they expected to go into business again as soon as they could get rid of the complications at Macon. Now, says I, if your statement is true, you must protect this bank first. I wont act unless you do as receiver or assignee or whatever it was, and they agreed to it; and at the same time time they said they owed the Bank of Kansas City, and I told them that was all right, to protect the banks.

Q. What was your reason for giving this kind of advice?

By Mr. DOUGLASS: I object to the question as irrelevant and immaterial.

A. I had two or three reasons; one was that the Valley Bank had failed a short time before and public confidence was impaired; another was, if they had this surplus of twenty thousand
378 dollars, knowing how grocery men buy their goods, I knew that I could pay out within from sixty to ninety days not only the deed of trust, but also average payments on the balance of the debts by the time they were due; another reason was that they both told me—R. A. Melone and C. H. Benedict—that they expected to go into business again as soon as J. B. Melone's interest could be done away with; that they expected to go into business again here as soon as they could settle this thing up, and I told them if that was so they ought to keep on the good side of the banks, and if they were solvent and had twenty thousand dollars ahead they ought to pay the banks, as they would want accommodation afterwards, and if they were prompt with the banks in this case they would extend them accommodation afterwards that they wouldn't otherwise.

Q. You speak of the deed of trust; you mean the deed to the banks here, don't you?

A. Yes, sir.

Q. The same debts that were afterwards secured by this deed of trust?

A. Yes, sir.

Q. Now, you speak of paying all the debts within from sixty to ninety days from the time you took charge of it?

A. Yes, sir.

Q. You mean by that that all of the debts owing by Benedict, Melone & Co. could be paid within sixty days, or at the furtherest ninety days, from the time you took charge of the property?

A. Yes, sir; including the bank debts.

Q. Where was it, Mr. Stewart, that Benedict and Melone concluded to make this deed of trust; do you remember whether it was at Craig's office or after they came up to our office?

A. It was at Craig's office.

379 Q. Where did they go from Craig's office?

A. I think they came up here.

Q. What was done after they got up here?

A. Well, the first thing—I told them if I took charge of it—I didn't want to take charge of it at all, because I wasn't well—I told them if I did they had to prefer the banks.

Q. Well, they did resolve on securing the banks here. What did they do after they came to Karnes & Ess' office—proceed to draw the deed of trust?

A. They came up here, and you and Captain Craig drew up the deed of trust. Mr. Stonestreet wrote up the deed of trust. Melone and Benedict were in here.

Q. You know that the deed of trust was drawn up?

A. Yes, sir.

Q. Do you remember what time that was finished?

A. I think it was finished about two or three o'clock; it was commenced early in the day, but I don't think it was finished until two or three o'clock.

Q. Do you remember who came up during the time we were drawing it up?

A. Yes, sir; Mr. Cooper or Mr. Whipple—I don't remember which one—came up. They also had a claim, and it was agreed by Mr. Benedict and Mr. Melone and myself to put them in, too.

Q. That was about noon, was it?

A. It was from twelve to two o'clock; somewhere along there.

Q. You say that the deed of trust was finished about two or three o'clock?

A. I think so; that is my recollection.

Q. What was done then?

A. Well, the deed of trust—my recollection is that it was delivered to me and Mr. L. F. Wilson, vice-president of the Kansas City Savings Association, who took it to record it.

380 Q. After Mr. Wilson left the office of Karnes & Ess did you see him any more in the office during the afternoon?

A. No, sir; I think not.

Q. Now, what was done after this deed of trust was delivered?

A. After the deed of trust was delivered it was a question what was best to do about the balance of it—that is, they knew they had more than enough to pay off this deed of trust, and they consulted here as to the best means to dispose of the balance. They wanted

to get their money out as quick as they could, so as to go into business; that is what they told me. I didn't hear all of the talk; I heard a little of it. I recollect they said make me—I think it was me—assignee. I don't know whether it was you (Ess) or Craig said if an assignee was appointed the papers would have to be sent down to Macon for J. B. Melone to sign them, and if sent down there as soon as this deed of trust was recorded that creditors of J. B. Melone down there would run in ahead up here and attach property here and embarrass them on the rest of the stock; so, finally, they agreed on having a receiver appointed as the best way to get out of it.

Q. What time was that conclusion reached—to have a receiver appointed?

A. I don't know; it was some time in the afternoon; it was after the trust deed was executed.

Q. Don't you remember that the petition drawn occupied only about a page and a half of legal cap?

A. I don't recollect.

Q. What time did you leave the office of Karnes & Ess that afternoon?

A. I think I left about the time I turned the trust deed over to Mr. L. F. Wilson. My recollection is that I turned it over to him, and he said he would take it down and have it recorded, at
381 two or three o'clock; somewhere along there.

Q. When were you informed as to your appointment as receiver?

A. It was the next day some time; I don't recollect what time. In fact, I didn't know what they were going to make me on the balance. I supposed they wanted to get me in in some capacity—that is, to wind up the stock.

Q. You remember that the question of making an assignment was discussed?

A. Yes, sir; it was after the deed of trust was executed. That was first because I wouldn't do anything unless they protected the banks. If there was any fault about that it was my fault; I will shoulder that.

Q. You remember that the question of making a voluntary assignment was discussed?

A. Yes, sir.

Q. Don't you remember that the decision was against making it?

A. I don't know whether it was discussed before making of the trust deed or not. I made it *sine qua non* that I wouldn't act unless this bank was secured. My reasons for securing the bank I have given before.

Q. You were informed the next day that you had been appointed receiver?

A. Yes, sir; I think it was the next day.

Q. You were also informed that a bond was required of you for a hundred and twenty-five thousand dollars, with securities?

A. Yes, sir.

Q. That was given on the 17th.

A. I think it was given on the morning of the 17th—the bond; I know it was.

Q. That was given on the supposition that there would be about seventy or seventy-five thousand dollars of assets?

A. It was given on the supposition that there would be a
382 surplus of at least twenty thousand dollars on the stock.

Q. Wasn't the bond given for about double the amount which would come into your hands?

A. Yes, sir; I think it was about seventy-five thousand dollars.

Q. Did you have the key to the store on the evening of the 16th or did you get it on the morning of the 17th?

A. I couldn't tell about that.

Q. Don't you remember that you got the key on the evening of the 16th?

A. I believe I did, and took the sign down and took possession.

Q. Now, since you have commenced to act as receiver have you kept books?

A. Yes, sir; some time. I had a book-keeper part of the time.

Q. Have you kept a cash account?

A. Yes, sir.

Q. You may state to the notary your daily cash receipts from the 17th of February up to the last of April.

By Mr. DOUGLASS: I object to the question as irrelevant and immaterial.

A. I figured it up yesterday; it was enough in the two months to pay out everything—the trust deed and everything else they reported to me.

Q. How much were your cash receipts on the 17th of February, 1882?

(After this question was asked counsel for complainants and defendants directed the following entry to be made:)

"It was agreed by counsel for complainants and defendants that Mr. Stewart might make a copy from his cash book, showing his daily receipts from February 17th to April 17th, both inclusive, and that the same may be attached hereto, marked Exhibit 'A,' and made a part hereof."

By Mr. DOUGLASS: I object to this only on the ground of
383 irrelevancy and incompetency.

Q. Have you a statement that was given you by Richard A. Melone or C. H. Benedict at any time as to the assets and liabilities?

A. I have an approximate one; it might miss it a hundred dollars or so, on account of the clerical errors; it is within one hundred or two hundred dollars of it.

A. Is this the paper (showing)?

A. Yes, sir.

Q. By whom was this paper made out?

A. By their book-keeper.

By Mr. Ess: I offer this paper in evidence.

(The same was thereupon marked Exhibit "B" and attached hereto.)

By Mr. Douglass: I object to the introduction of this paper as incompetent and immaterial, and as a statement not made by either Benedict or Melone or in their presence, and for the further reason that the statement was made after the dissolution of the firm and when the receiver was in possession.

Q. State whether you ever showed this statement to Benedict and Melone afterwards.

A. Yes, sir; to both of them.

Q. From whom did you get this statement?

A. Eugene Lyle, brother-in-law of C. H. Benedict and bookkeeper of the firm.

Q. After the close of business on the 7th of March, '82, how much money did you collect from the assets of Benedict, Melone & Co.?

A. About twenty-two thousand dollars.

Q. When were these bank debts paid off?

A. They were paid off on the 8th day of March—if I recollect right, 1882.

Q. What time of the day?

A. They were paid off in the morning.

384 Q. How many attachments had been issued at that time?

A. My recollection is that only one had been issued, the first or second day after I took charge; that was Plankington & Armours'; that was the only one, and I had enough to protect myself if that attachment stuck—that is, to pay these banks off and then pay this attachment off.

Q. Where is the book of Benedict, Melone & Co. that shows the liabilities of the firm, showing these debts to the banks here in Kansas City?

A. It is in the ledger. I will bring it up if you want it.

"It was here agreed by counsel for complainants and defendants that a statement showing the names of the creditors of the firm of Benedict, Melone & Co. and their citizenship and the amount of their debts and the time they accrued—such statement to show briefly the nature of the debt and the manner contracted." The same is hereto attached and marked Exhibit "C."

Q. You attended, also, to the allowance of claims under the order of the court?

A. Yes, sir.

Q. You made a report to the court?

A. Yes, sir.

Q. There were three classes reported, were there not?

A. Yes, sir.

Q. In the first class there were?

A. Claims proved up.

Q. About these there was no dispute?

A. No dispute.

Q. Then what was the second class?

A. Claims which appeared on the books, which were not proved up, which I considered good.

Q. What was the other class?

385 A. Doubtful claims.

Q. These were all set out in your report?

A. Yes, sir.

"It was here agreed by counsel for complainants and defendants that a copy of this report may be hereto attached, marked Exhibit 'D,' embracing the amount of claims in each division."

Q. You may state what claims were presented and proved up January 6th, 1863, that were notes and drafts that were formerly held by one or both of the banks at Macon City and negotiated by them, and which, being negotiable, were not disputed, but were not on the books of Benedict, Melone & Co.

A. W. T. Bail, $1,500.00, Kirksville, Missouri; S. P. Griffith, $1,500.00, Bowling Green, Missouri.

Q. Was the S. P. Griffith claim of the Farmers' Bank of Bowling Green?

A. Yes, sir.

Q. What was W. T. Bain?

A. He is either president or cashier of the Bank of Kirksville.

Q. Was the Bain claim the Kirksville Bank claim?

A. Yes, sir.

Q. Now, what was the claim of the Boatmen's Savings Bank of St. Louis?

A. There is one for $2,231.86; another for $1,500.00, and another for $1,200.00.

Q. Now, what claim was held by Donnell, Lawson & Simpson, of the notes or bills of exchange originally held by one of the banks at Macon City and negotiated with them?

A. One for $750.00, one for $1,500.00, and one for $2,000.00.

Q. What claims were held by the St. Louis National Bank of St. Louis?

386 A. One for $2,000.00, one for $1,500.00, and one for $1,000.00.

Q. What claim was held by the Union National Bank of Chicago?

A. One for $1,500.00.

Q. These amounts you have just given were claims for notes or drafts of which no account could be found on the books of Benedict, Melone & Co.?

A. None whatever.

Q. Now, the claims reported as doubtful amounted to how much?

A. $33,093.12.

Q. Those were made up almost exclusively of the Macon Bank claims, were they not?

A. Yes, sir.

Q. Have you ever received any pay for your services as trustee?

A. No, sir; I have never had a cent. I made an application for

pay to Judge Gill, but he said he had nothing to do with the trustee at all.

Q. Why is it you didn't take your pay out as trustee at the time you paid the bank debts, on March 8th, 1882?

A. Because I supposed they had a surplus of from eighteen to twenty thousand dollars, and I supposed my pay would be all right.

Cross-examination by Mr. DOUGLASS:

Q. When R. A. Melone saw you at your house he told you that J. B. Melone had sent a messenger from Macon with a note in which the fact was stated that the Macon banks had failed, and that it would be necessary for the firm of Benedict, Melone & Co. to do something; that is about what you stated?

A. Yes, sir—that is, to get the property so as to protect the creditors up here; that seemed to be the idea all the way through.

387 Q. To secure the creditors here as against the creditors of the banks; that was the idea?

A. Against the creditors of J. B. Melone down there in that bank; that is it.

Q. Did he show you the letter?

A. No, sir; I never saw the letter; in fact, I don't know that it was a letter. I understood since that it was a messenger that came up. I didn't see the letter or messenger either.

Q. Didn't he state to you that J. B. Melone wanted an assignment made of the firm property here and wished you to act as assignee?

A. Yes, sir; he wanted me to act as assignee. He wanted some kind of an assignment. They wanted to make some disposition of their property here—that is my understanding—so as to protect the firm of Benedict, Melone & Co. to protect the mercantile creditors from any creditors of J. B. Melone down there as cashier of that bank.

Q. You won't say he didn't mention assignment?

A. No, sir.

Q. Your recollection is that the object was to make a disposition of their property to effect that purpose?

A. Yes, sir.

Q. Well, finally after talking the matter over *pro* and *con*, urging reasons why the banks should be preferred, which you have stated, you said that you wouldn't act as assignee or in any capacity of any kind until the banks were preferred; that is so; that is about the substance of it?

A. Yes, sir.

Q. Now, if there had been simply a talk between you and them as to the execution of the deed of trust or that mortgage, it wouldn't have been necessary for you to have stated that you wouldn't

388 act in any capacity unless the mortgage was executed, was it?

A. I don't understand that question.

Q. Is your recollection clear that there was some conversation between you and them in regard to wanting a deed of assignment for the benefit of the creditors here or not?

A. Yes, sir; we talked about it as to the best way to do it. I

asked them how they stood. I said, Boys, are you all right? They said, Yes. I said, If you are all right, how much surplus will you have? They told me about twenty thousand dollars. That is the reason I told them. (Interrupted by next question.)

Q. That you wouldn't act as assignee unless they preferred the banks?

A. I did.

Q. And after that you asked them for the privilege of your lawyers, Karnes & Ess?

A. Yes, sir; I wouldn't consent to act until I saw my lawyers.

Q. You came up and consulted and then went down to Craig's office, and while up here you told Mr. Ess of the failure of the Macon banks, and you told him also, did you not, that the Kansas City Savings Association would be involved in the matter on account of Benedict, Melone & Co. owing them, and suggested that they be secured?

A. Yes, sir.

Q. And then it was that Mr. Ess went down to Craig's office, was it not?

A. I think we went down together.

Q. At what time did you go and tell Mr. Wilson about this failure of the Macon banks?

A. I haven't said a word about Mr. Wilson.

Q. Had you seen him before you saw Mr. Ess?

A. I never spoke a word to Mr. Wilson about it until after
389 Mr. Wilson came with his notes to copy them into the deed of trust.

Q. The first you saw of Mr. Wilson was down at Craig's office?

A. I think it was up here, after we had determined what they would do.

Q. While you were down at Craig's office Wilson was there with Mr. Ess?

A. He may have been there; I don't recollect.

Q. You came from Craig's office up here and the deed of trust was made in this office?

A. Yes, sir.

Q. Craig came up?

A. Yes, sir.

Q. Also Benedict and Melone?

A. Yes, sir.

Q. Now, you think they had about concluded to prefer the banks down there in Craig's office before coming up here?

A. Yes, sir.

Q. They agreed to prefer the banks down there?

A. Yes, sir.

Q. Now, you stated a moment ago that you were not certain, if I recollect aright, you were not certain whether there was any talk about a deed of assignment after the execution of the deed of trust or not; what is your best impression?

A. I think not. That was a private talk between Benedict, Melone, and myself as to the best way to do. I told them—in fact, I

told them two or three times—that I wouldn't act. I told them that I was in delicate health and wasn't able to do very much, but if I did they must protect these banks first.

Q. Under no circumstances would you have acted in the disposition of their property, either by assignment or otherwise, unless the banks had been preferred first?

390 A. No, sir; the reason was, as I stated, they would have this surplus.

Q. I am asking simply about the fact; I understand your reasons.

A. I wouldn't have had anything to do with the thing if I had known how it was going to turn out.

Q. After the parties came to Mr. Ess' office he went to see the Bank of Kansas City, didn't he?

A. I think he did.

Q. And subsequently to that Mr. Whipple or Cooper, one, came up here?

A. Yes, sir; they came up and wanted to be protected. I didn't now anything about that bank. I told Benedict and Melone to put them in, too, and they agreed to it.

Q. Up to that time you didn't know of any indebtedness down here?

A. No, sir. In fact, I didn't know at the start that they owed the Bank of Kansas City. When I insisted on protecting the Kansas City Savings Association they told me they owed the Bank of Kansas City. I said, "Well, protect them, too." It was a scary time with the banks about that time.

Q. You think the deed of trust was made about two o'clock in the afternoon?

A. I think I turned it over to L. F. Wilson about two o'clock.

Q. Did you ever see the deed of trust—see the endorsement on the back as to the time it was recorded? Look at that endorsement and see.

A. I didn't know what time he took it down; I turned it over to him, I think, at two or three o'clock.

Q. Now, seven ten would be after business hours, would it not?

A. Yes, sir; seven ten was after business hours.

391 Q. You couldn't be mistaken in the time it was turned over to Mr. Wilson, could you?

A. No, sir; it must have been two or three o'clock; that is my recollection.

Q. You can't explain why it was that that deed wasn't filed for record until seven o'clock and ten minutes?

A. No, sir; I cannot.

Q. And as a matter of fact you don't know how it got to the recorder's office?

A. Except that I turned it over to Mr. Wilson.

Q. Have you been about the court-house enough to know what the usual hours are at the recorder's office?

A. No, sir.

Q. Specially in the winter months—in the month of February?

A. No, sir; the extra late hour I don't know anything about. I would say that it wasn't any later than three o'clock when I turned it over to Wilson.

Q. How long did you remain in Mr. Ess' office after the execution of the deed of trust; you didn't stay very long, did you?

A. No; I think not; I think I turned over the deed of trust and went away. I didn't know how they were going to dispose — or what other action they were going to take in the matter.

Q. You stated a moment ago after the deed of trust was executed there was talk of an assignment and also talk of a receiver?

A. I stated that there was talk of an assignment. The only reason given against an assignment was that it would have to be sent to Macon to get the signature, and then they talked about a receiver. I didn't know positively what conclusion they came to.

Q. Now, Mr. Stewart, couldn't you be mistaken in that,
392 and wasn't some of this talk about an assignment and receivership before that deed of trust was turned over to you?

A. I think not.

Q. You must have heard it before you left the office; you didn't come back, did you?

A. I remained a little while after I turned the deed of trust over to Wilson. I was there a few minutes.

Q. You didn't come back any more after you left, did you?

A. I think not, sir; I am not sure. I think I went down that same afternoon and took the sign down at Benedict, Malone & Co.'s place of business.

Q. You think you did that; but whether you did or not you are not positive?

A. I think so.

Q. Whatever you heard, then, about an assignment or receivership—whatever conversation you heard about either was before you left the office of Karnes & Ess?

A. Yes, sir; I think so.

Q. Didn't you state some time ago, in your examination, that you supposed that you would have to wind the concern up in some manner—in some way—that is, that you would be appointed either assignee or receiver, and wind it up in connection with the deed of trust?

A. I suppose so; after the deed of trust; that was first. I wouldn't accept—that is, have anything to do with it—unless they made the banks preferred creditors. After that I didn't know really how they would wind it up.

Q. Didn't you understand that it was to be wound up in some way or other, and that you would be the party appointed to take charge of the stock of goods?

A. Well, now, if you will let me go back a little——
393 Q. Make your own answer.

A. Well, when I went up to consult Mr. Ess about it—I told them I wanted to consult Karnes & Ess before I took any part in it whatever—I told them that it seemed to me that if they were solvent and had a surplus of twenty thousand dollars certainly they

ought to fix some way without making any assignment whatever. I told them that I didn't know the law about it, but that it seemed to me it ought to be done that way, if they were solvent as they said. I understood if they made an assignment I was to be the party, and if they had a receiver appointed I supposed I would be the one.

Q. Didn't you state in your examination by Mr. Ess that after the deed of trust was made either Benedict or Melone or somebody in the room wanted to make you assignee, and that then it was suggested by somebody that the deed would have to be sent to Macon, Missouri, for the signature of James B. Melone, and that it wouldn't do to make an assignment?

A. No, sir; part of that is right and part not.

Q. Answer the fact.

A. Not to make me assignee; but that was the objection to having an assignee appointed, that they would have to send the paper down to Macon, and in a short time the creditors of J. B. Melone would come and attach J. B. Melone's interest in the stock.

Q. Look at this statement marked Exhibit "B." This is the statement made you by the book-keeper?

A. Yes, sir.

Q. This is his writing?

A. Yes, sir.

Q. Now, in that statement there appears these words: "bills preferred," $19,000.00; what does that mean?

394 A. These notes and acceptances for which the deed of trust was executed.

Q. In other words, the bank debts?

A. Yes, sir.

Q. By that showing it appeared that they didn't owe only about thirty-four thousand dollars?

A. Yes, sir; that is it.

Q. Who signed your bond of indemnity given you by the Citizens' National Bank?

A. Well, really I don't know. Mr. Cooper was one; I don't know the rest.

Q. Have you got these bonds?

A. Yes, sir; I can get them. I believe Mr. Whipple was the other.

Q. You don't recollect the names?

A. Mr. Whipple and Mr. Cooper, I think.

Q. Who signed the bond given you by the Bank of Kansas City?

A. E. K. Thornton and somebody else.

Redirect examination by Mr. DEAN:

Q. You were not only well acquainted with the Melones while they lived in Macon, Missouri, but you had also been in the grocery business yourself?

A. Yes, sir; all my life.

Q. This fact was known to Benedict, Melone & Co.?

A. Yes, sir; that is the reason Mr. Melone down there, one rea-

son, he wanted me to act, and one reason the partners here wanted me to act.

Q. Where are all the funds you received in your capacity as trustee and receiver?

A. All that haven't been paid out are in the Bank of Commerce. I believe I have two dollars in the Bank of Kansas City.

395 Q. You paid out everything on the order of the court?

A. Yes, sir; not a cent, except the necessary expenses going on, which he told me to pay.

Q. I understand that you took no order from the court when you paid the money to the banks?

A. No, sir; I went to see Judge Gill about it. He said it was none of his business; that he wouldn't give any order; that if I wanted an order, as receiver, then he would talk about it; that is the substance of it.

Q. What have you paid to the creditors of Benedict, Melone & Co.?

A. Thirty-three and a third per cent.

Q. I will ask you whether you have paid the complainants in this action thirty-three and a third per cent.?

A. Yes, sir; I paid all.

Q. You have paid the complainants in this action as receiver?

A. Yes, sir.

Q. These claims have been allowed by the court of which you are receiver?

A. Yes, sir.

Q. How much money have you on hand yet?

A. I don't know exactly how much; it is all on deposit; I have certificates of deposit for it; I think about six or seven thousand dollars.

"It is admitted that the entire indebtedness described in the deed of trust executed by the firm of Benedict, Melone & Co. to Charles Stewart, February 16th, 1882, to the use and benefit of the Kansas City Savings Association, the Bank of Kansas City, and the Citizens' National Bank, was for money previously advanced by said banks, respectively, to said firm, and was then owing by said firm

396 to said banks, and that said indebtedness is correctly described in said deed of trust."

(This agreement was entered into between counsel for complainants and defendants, and is embodied herein under their direction.)

I, Henry M. Stonestreet, a notary public within and for the county of Jackson and State of Missouri, do certify that there came before me, in the office of Karnes & Ess, in Kansas City, Missouri, at the times hereinbefore noted, L. F. Wilson, Henry N. Ess, and Charles Stewart, who were by me first respectively sworn to testify the whole truth, of their knowledge, touching the matter in controversy in the circuit court of the United States in and for the western division of the western district of Missouri, wherein the Union National Bank of Chicago *et al.* are complainants and the Bank of Kansas

City *et al.* are defendants; that they were examined, and their examination was reduced to writing by me in short-hand, and that the foregoing is a true and accurate transcript thereof, and the same is herewith returned. My commission will expire August 23rd, 1884.

[SEAL.] HENRY M. STONESTREET,
Notary Public, Jackson Co., Mo.

397 *Statement of Benedict, Melone & Co., Feb. 17th, 1882.*

Assets:

Accounts rec'v.	$41,299 62
Bills rec'v.	647 58
Mdse., as per invoice	29,264 28
Fixtures, as per invoice, wagon, horses, &c.	903 62
	$72,115 10

Liabilities:

Accounts pay.	$28,686 96
Bills pay.	5,781 68
Bills pay. (preferred)	19,000 00
	53,468 64
Balance	18,646 46
	$72,115 10

$14,449.30, accounts.
13,708.73.

Exhibit "B." H. M. S.

EXHIBIT "A." H. M. S.

Chas. Stewart, Trustee and Receiver of Benedict, Melone & Co., Dr.

1882.

Feb. 17.	To cash receipts	$1,026 30
" 18.	" " "	716 27
" 20.	" " "	739 33
" 21.	" " "	648 10
" 22.	" " "	887 70
" 23.	" " "	1,455 57
" 24.	" " "	1,045 19
" 25.	" " "	906 92
		7,425 38

398			Am't bro't forward		7,425 38
		Feb. 27.	To cash receipts		1,820 66
	Feb.	28.	To cash receipts		1,373 34
	Mar.	1.	" " "		1,101 87
	"	2.	" " "		1,796 51
	"	3.	" " "		1,148 70
	"	4.	" " "		1,568 51
	"	6.	" " "		1,677 07
	"	7.	" " "		3,067 28
	"	8.	" " "		942 33
	"	9.	" " "		871 23
	"	10.	" " "		944 29
	"	11.	" " "		618 95
	"	13.	" " "		1,116 28
	"	14.	" " "		1,377 96
	"	15.	" " "		1,181 39
	"	16.	" " "		809 35
	"	17.	" " "		1,173 95
	"	18.	" " "		708 99
	"	20.	" " "		1,210 87
	"	21.	" " "		1,148 44
	"	22.	" " "		1,921 31
	"	23.	" " "		862 07
	"	24.	" " "		682 54
	"	25.	" " "		1,356 95
	"	27.	" " "		1,234 19
	"	28.	" " "		3,411 81
	"	29.	" " "		510 17
	"	30.	" " "		795 87
	"	31.	" " "		306 07
	Apr.	1.	" " "		676 55
	"	3.	" " "		694 78
					45,535 66
399			Am't brought forward		$45,535 66
		Apr. 4.	To cash receipts		429 23
	Apr.	5.	To cash receipts		974 47
	"	6.	" " "		564 63
	"	7.	" " "		735 90
	"	8.	" " "		111 32
	"	10.	" " "		114 23
	"	11.	" " "		522 31
	"	12.	" " "		560 10
	"	13.	" " "		123 88
	"	14.	" " "		66 01
	"	15.	" " "		21 68
	"	17.	" " "		163 27
			Total receipts, ending April 17th, 1882		49,922 69

Examination of CHAS. STEWART, by SHANNON DOUGLASS, Esq., by consent:

Q. Are you a stockholder in the Bank of Commerce? If so, when did you become a stockholder?

A. Yes, sir. When they reorganized the Kansas City Savings Association into the Bank of Commerce, which was some months after the failure of Benedict, Melone & Co., I bought $1,000 worth of stock, and for which I paid cash. I received no consideration whatever, either directly or indirectly, from said bank for my services as trustee. Said purchase was strictly an investment.

Q. Did you also keep an account with the Bank of Kansas City and the Citizens' National Bank, as trustee of Benedict, Melone & Co., and up to and including the time that you paid the banks the amounts claimed by them on account of their preference?

400 A. Yes I kept an account with each of these banks, as trustee, just as I did with the Kansas City Savings Association—that is, the amount I kept with these banks was in proportion to their interest in the deed of trust.

Q. Have you the bonds of indemnity given you by the three banks?

A. I have. They are intended to be, and I think are, exactly alike.

The bond given by the Kansas City Savings Association is, in words and figures as follows, to wit:

Whereas Benedict, Melone & Co. were indebted to the Kansas City Savings Association, the Bank of Kansas City, and the Citizens' National Bank in various sums of money; and whereas said debts were secured by deed of trust, duly acknowledged and recorded in the recorder's office of Jackson county, Missouri, conveying to Charles Stewart certain property in said deed described; and whereas from sales and collections said trust has realized a sum of money sufficient to pay the debts secured by said deed of trust, and said Stewart proposes to pay said debt so secured; and whereas said Stewart is the receiver of Benedict, Melone & Co. and some persons, supposed to be creditors of Benedict, Melone & Co., may bring suit to set aside said deed of trust or otherwise to affect the same: Now, therefore, the undersigned do hereby agree that in case payment of said debt so secured shall be made to the Kansas City Savings Association the Kansas City Savings Association will protect and save said Stewart harmless from such payment as far as the debts due to it are concerned; and we do hereby agree that in case suit shall be brought against said Stewart we will employ counsel to defend the said suit and pay their fees, and that we will pay such judgment as

401 may be rendered in the case, with all the costs of suit, and the Kansas City Savings Association shall pay such part of such judgment and costs and attorneys' fees as may be equal to their proportion of the debt paid to the three banks aforesaid.

Witness our hands and seals this March 8th, 1882.

A. J. WHITE. [SEAL.]
LUKE F. WILSON. [SEAL.]
C. G. PERRIN. [SEAL.]

It is agreed and stipulated that the bonds given by the other two banks are in substance the same, excepting as to the signatures and amounts.

Q. Do you recollect the total amount received by you from the property and effects of Benedict, Melone & Co. up to this time?

A. Between fifty-eight and sixty thousand dollars.

Q. Before these bonds were given did you receive any notice from these banks, or either of them, demanding payment? If so, and in writing, please produce them.

A. I did, and they are as follows:

CITIZENS' NATIONAL BANK, KANSAS CITY, MO., *Mar. 8th*, 1882.

Chas. Stewart, Esq., trustee:

You have money enough on hand to pay our debts secured by deed of trust; unless you pay the same at once we shall sue you for it.

Resp'y yours, A. A. WHIPPLE.

BANK OF KANSAS CITY, KANSAS CITY, MO., 3, *7th*, 1882.

Chas. Stewart, Esq., trustee, &c.

DEAR SIR: You have funds on hand sufficient to pay our debts secured by deed of trust to you as trustee; unless paid now you will be sued for it.

Yours, &c., E. K. THORNTON, *Cashier*.

402 KANSAS CITY SAVINGS ASSOCIATION,
KANSAS CITY, MO., *M'ch* 8, 1882.

Charles Stewart, Esq., trustee, Kansas City, Mo.

D'R SIR: I learn from you that you have funds on hand applicable to indebtedness secured by deed of trust given by Benedict, Melone & Co. to secure preferred claims of Bank of Kansas City, Citizens' Nat'l Bank, & Kansas City S'v'gs Ass'n. We understand that some parties object to your paying out said funds, but unless our claim is paid we shall bring suit at once to compel payment of the same.

Very respectfully, L. F. WILSON, *V. Pr'd't*.

EXHIBIT "E." H. M. S.

In the Circuit Court of the United States in and for the Western Division of the Western District of Missouri. In Equity.

THE UNION NATIONAL BANK OF CHICAGO *et al.*, Complainants,
vs.
THE BANK OF KANSAS CITY *et al.*, Respondents.

The following facts are admitted as of record in the Jackson circuit court, in Jackson county, Missouri, to save time and expense of getting copies from the record. On February 16th, 1882, a petition was filed in the Jackson circuit court, at Kansas City, Missouri, in words and figures following, to wit:

In the Jackson Circuit Court, in Jackson County, Missouri, Sitting at Kansas City, Missouri.

403 CHARLES H. BENEDICT, Plaintiff, } Case No. 2007.
vs.
RICHARD A. MELONE and JAMES B. MELONE, Defendants. }

Plaintiff states that this plaintiff and the defendants are partners in trade, under the firm name and style of Benedict, Melone & Co. Said partnership began in January, 1880, and is dissolvable at the pleasure of either party. Under the said partnership this plaintiff contributed large sums of money, and the defendants likewise contributed large sums of money. Said firm is largely indebted to various persons from whom said firm have bought goods. This plaintiff has dissolved said copartnership. This plaintiff has the control, with the defendants, of a large stock of goods, wares, and merchandise, as well as debts due to said firm. Said James B. Melone has become insolvent and can no longer continue in the said firm. This plaintiff prays the court to appoint a receiver for partnership property; that the said partnership property may be sold; that the partnership debts may be ascertained and paid, and that an account may be taken of what is due each partner, and that the same may be paid, and for such other and further relief as may be proper.

(Signed) KARNES & ESS,
Att'ys for Plaintiff.

On this petition the court made an order appointing Charles Stewart receiver, fixing the bond at one hundred and twenty-five thousand dollars (125,000.00), with sureties to be approved by the judge of said court.

February 17th, 1882, bond presented, with Stewart as principal and James Hurt, Fletcher Cowherd, and E. K. Thornton as sureties. Bond approved by the court February 17th, 1882.

On February 21st, 1882, Charles Stewart files petition for order to sell stock.

404 Court made an order that he sell the stock at private sale at not less than cost, and that he file an inventory of the property. March 6th, 1882, Charles Stewart, as trustee and receiver, files an inventory, bills receivable, occupying ten pages, amounting to $41,732.70; store fixtures, $750.62; stock of goods, occupying nineteen pages, amounting to $29,264.28; lease, sold March 3rd, 1882, of building occupied by Benedict, Melone & Co., for $200.00, making total inventory $71,947.60. The lease of the building occupied by Benedict, Melone & Co. was sold and reported on March 3rd, 1882, by Charles Stewart, as trustee and receiver. On February 17th, 1882, John Plankington, S. B. Armour, P. D. Armour, A. W. Armour, H. O. Armour, K. B. Armour, William Plankington, and William P. Allcutt, as plaintiffs, brought suit by attachment against Charles H. Benedict and Richard A. Melone and James B. Melone, composing the firm of Benedict, Melone & Co. The petition is on an account for goods sold, amounting to $606.06. Pratt,

Brumback & Ferry, attorneys for the plaintiffs. Affidavit for attachment was made and filed, stating that the defendants had fraudulently conveyed or assigned their property or effects so as to hinder or delay their creditors, and that the defendants are about to fraudulently convey or assign their property or effects so as to hinder or delay their creditors, and that the defendants failed to pay the price or value of the articles or things delivered, which by contract they were bound to pay on delivery. By leave of court obtained, Charles Stewart was garnisheed February 18th, 1882, attaching in his hands all property belonging to defendants. On April 10th, 1882 defendants filed plea in abatement to the attachment, denying under oath the grounds for attachment, as set out in the affidavit for attachment. On October 9th, 1882, interrogatories to Charles Stewart, garnishee, filed.

405 On October 17th, 1882. Charles Stewart filed answer to interrogatories in words and figures as follows, to wit:

Answer of Charles Stewart to Interrogatories filed in the Above Cause.

In the Jackson Circuit Court, in Jackson County, Missouri, Sitting at Kansas City, Missouri.

JOHN W. PLANKINGTON *et al.*, Plaintiffs,

vs.

CHARLES H. BENEDICT *et al.*, Defendants.

First interrogatory. Are you receiver in possession of the assets of Benedict, Melone & Co.; if so, when were you appointed, by what court, and in what case?

A. I am the receiver in the possession of the assets of Benedict, Melone & Co. I was appointed on February 17th, 1882, by the circuit court of Jackson county, Missouri, division number one, in case No. 2007, Charles H. Benedict, plaintiff, against James B. Melone and Richard A. Melone, defendants.

Interrogatory No. 2. What moneys or assets of Benedict, Melone & Co. have you now in your possession or under your control, either as receiver or otherwise? Give detailed statement showing in full all such money or assets.

A. When I was appointed receiver of Benedict, Melone & Co. in case No. 2007, Charles H. Benedict, plaintiff, against James B. Melone and Richard A. Melone, I immediately gave bond and qualified as such reciver. On February 21st, 1882, the circuit court of Jackson county, Missouri, in division No. 1, in the said cause made

406 an order that I should sell the merchandise lately belonging to said late firm of Benedict, Melone & Co. I filed in said cause No. 2007 an inventory of said goods. I sold all said goods under the order of said court. There now remains on hand the sum of thirty-five thousand six hundred and forty-two $\frac{43}{100}$ dollars, being balance left after payment of prior deed of trust on the property and expense of sale. I have no control over the said assets or the said money, except as directed by the court in the said cause, as

I am advised by counsel. I am advised by counsel that said moneys and assets are not in my possession or control, but said assets are under the control of the court in the said cause. I have nothing under my control or in my possession belonging to Benedict, Melone & Co., or either of them, except as receiver in the said cause No. 2007.

Interrogatory No. 3. Specify particularly all the moneys and assets in your possession or under your control at or since your garnishment herein belonging to Benedict, Melone & Co. or any or all of the defendants, or in which they or any of them were or are interested, not specified in answer to any prior interrogatory.

A. When I took the stock of goods and other assets they were subject to a deed of trust thereon, executed and delivered and duly acknowledged and filed for record prior to my appointment as receiver; this deed of trust was filed for record February 16th, 1882, at 7.10 p. m., and is recorded in the recorder's office of Jackson county, Mo., in Chattel Mortgage Book B, No. 9, page 155. I paid out to the Kansas City Savings Association eleven thousand four hundred and ninety-eight $\frac{44}{100}$ dollars, to the Bank of Kansas City five thousand nine hundred and fifty-two and $\frac{23}{100}$ dollars, and to the Citizens' National Bank the sum of fourteen hundred and eighty-five dollars.

407 Interrogatory 4. Since your garnishment have you paid any or disposed of in any manner any money or assets that belonged to Benedict, Melone & Co., or in which that firm or any defendant herein had any interest? If so, specify the same particularly.

A. I have not paid away any money except in the payment of the above-described debts and except expenses and except a portion of the property received by me, — was ordered by said court in said cause to be delivered to H. C. & C. Durand. Said order is recorded at length in Book O, page 177, of the records of this court. I have the proceeds of all goods sold and all collections made, except payments above set forth.

Interrogatory 5. At or since being garnisheed herein were you or are you now indebted to, or are you *now* or did you owe, or do you now owe, Benedict, Melone & Co. or any of defendants any money? If so, specify the same and how the same is evidenced, as secured.

A. No, sir.

Interrogatory six. State particularly all assets and property of every kind you had possession of or under your control in any capacity whatever at or since you were garnisheed herein which was or is owned by Benedict, Melone & Co., or in which they or any of defendants were or are interested.

A. I cannot answer this question more fully than I have done in answer to prior interrogatories. The debts due from Benedict, Melone & Co. will be fully fifty thousand dollars. Said debts are not proved.

The assets in my hands will be insufficient to pay all the firm debts.

CHARLES STEWART, *Receiver.*

408 Subscribed and sworn to before me on this October 18th, 1882. My commission will expire August 23rd, 1884. Witness my hand and notarial seal, hereto affixed, at my office, in Kansas City, Jackson county, Missouri, this October 16th, 1882.

[SEAL.] HENRY M. STONESTREET,
Notary Public, Jackson County, Missouri.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, L. F. McCoy, clerk of the circuit court of Jackson county, Missouri, hereby certify that the foregoing is a full and complete copy of the answer of Chas. Stewart, receiver, to interrogatories filed in the case of John W. Plankington *et al. vs.* C. H. Benedict *et al.*, as the same appears on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in Kansas City, this 20th day of March, A. D. 1884.

[SEAL.] L. F. McCOY, *Clerk*,
By D. M. McCLANAHAN, *D. C.*

On December 13th, 1882, Record "Q," page 243, plea in abatement tried by the court and judgment rendered for the defendants. The attachment was dissolved and judgment for costs rendered against the plaintiffs in the attachments. The defendants declining to plead to the merits, said cause was submitted to the court; judgment rendered for the plaintiffs for $636.36.

On March 8th, 1882, the Consolidated Tank Line Company commenced suit against Charles H. Benedict, James B. Melone, and Richard A. Melone, composing the firm of Benedict, Melone
409 & Co., Tomlinson & Ross being attorneys for the plaintiff. Amount of debt sworn to in the affidavit for attachment was $652.23, on an account for goods sold. The grounds for attachment were that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Garnishment served on Charles Stewart, receiver of Benedict, Melone & Co., and on Charles Stewart, March 9th, 1882. Plea in abatement filed, denying under oath the ground for attachment, April 10th, 1882.

On December 13th, 1882, attachment dismissed by plaintiffs and judgment against plaintiffs for costs and for dissolution of the attachment. The parties declining to plead to the merits, judgment was rendered for plaintiffs for $681.50. This case was numbered 2053.

On March 8th, 1882, J. K. Armsby, John M. Waite, and Henry Newton, composing the firm of J. K. Armsby & Co., brought suit against James B. Melone, Richard A. Melone, and Charles H. Benedict; said suit was by attachment and is numbered 2054. Affidavit filed and amount of debt sworn to, $535.00 for goods sold, and the ground for attachment was that the defendants have fraudulently conveyed and assigned their property and effects so as to

hinder and delay their creditors. Plea in abatement to the attachment, denying under oath the grounds for attachment, filed April 10th, 1882. Garnishment served on Charles Stewart, receiver of Benedict, Melone & Co., and on Charles Stewart, on March 8th, 1882.

On October 13th, 1882, jury trial waived.

On December 9th, 1882, plaintiffs dismiss attachment; judgment for dissolution of attachment and against plaintiff for costs, and judgment for debt of $570.40.

On March 8th, 1882, P. D. Ridenour, H. W. Baker, S. Ridenour, and E. P. Baker, composing the firm of Ridenour, Baker &
410 Co., by Tomlinson & Ross, their attorneys, brought suit by attachment against the same defendants, the debt sworn to in the affidavit being $1,200.00, for goods sold. Ground for attachment, as set out in the affidavit, was that the defendants had fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors.

On March 9th, 1882, garnishment was served on Charles Stewart, receiver of Benedict, Melone & Co., and on Charles Stewart.

On April 10th, 1882, defendants filed plea in abatement to the attachment, denying under oath the grounds for attachment, as set out in the affidavit.

On October 12th, 1882, parties waive a jury trial.

On December 13th, 1882, plaintiffs dismiss the attachment. Judgment rendered against plaintiffs for costs, and that attachment be dissolved; judgment rendered at the same time for plaintiffs for $771.12.

On March 8th, 1882, Samuel Cupples, R. S. Brookins, H. G. Brookins, and A. W. Wallace, composing the firm of Samuel Cupples & Co., by Tomlinson & Ross, their attorneys, brought suit by attachment against the same defendants, composing the firm of Benedict, Melone & Co. Grounds for attachment sworn to in affidavit were that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors.

On March 9th, 1882, garnishment served on Charles Stewart, and Charles Stewart, receiver of Benedict, Melone & Co.

On April 10th, 1882, defendants file plea in abatement to the attachment, denying under oath the grounds therefor.

On October 13th, 1882, the parties waive a jury trial.

On December 9th, 1882, plaintiffs dismiss attachment, and judgment rendered as in the preceding cases.

On December 23d, 1882, judgment rendered for plaintiffs
411 for $1,184, debt. This case numbered 2056.

On March 9th, 1882, A. P. Fonda, Jervis Johnson, and J. N. Biddle bring suit by attachment against the same parties, by Lathrop & Smith, their attorneys. Debt sworn, $681.11. Ground for attachment, that the defendants have fraudulently conveyed or assigned their property and effects so as to hinder and delay their creditors; defendants have fraudulently concealed, removed, and disposed of their property or effects so as to hinder and delay their creditors.

On March 9th, 1882, garnishment was served on Charles Stewart, receiver of Benedict, Melone & Co., and on Charles Stewart.

On April 10th, 1882, defendants filed plea in abatement to the attachment.

On October 13th, 1882, parties waive a jury trial.

On December 13th, 1882, plaintiffs dismiss their attachment. Judgment for dissolution rendered as in the preceding cases, and judgment for plaintiffs for debt rendered for $712.10.

On March 9th, 1882, Mark W. Mendell and Emanuel W. Mendell, as plaintiffs, by Traber & Gibson, their attorneys, brought suit by attachment against the same defendants, and the amount sworn to was $892.37. Grounds for attachment were that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors; that the defendants have fraudulently disposed of their property and effects so as to hinder and delay their creditors; that the defendants are about fraudulently — convey and assign their property and effects so as to hinder and delay their creditors; that the defendants are about fraudulently to dispose of their property or effects so as to hinder and delay their creditors.

On March 10th, 1882, garnishment served on Charles Stewart and Charles Stewart, receiver of said firm.

412 On April 10th, 1882, defendants file plea in abatement to said attachment, denying under oath the grounds set out in said affidavit for attachment.

On October 12th, 1882, the parties waive a jury trial.

On December 13th, 1882, plaintiffs dismiss attachment; judgment against plaintiffs rendered for costs and dissolving the attachment, and at the same time judgment rendered for debt for $970.68, with ten per cent. interest, being suit on note. This case was numbered 2063.

On March 9th, 1882, the Corle Cracker & Confectionery Company, by Tichenor, Warner & Dean, brought suit by attachment against the same parties. Grounds for attachment, as shown in the affidavit, were that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors; that the defendants have fraudulently concealed, removed, and disposed of their property and effects so as to hinder and delay their creditors; that the defendants are about to fraudulently convey and assign their property and effects so as to hinder and delay their creditors; that the defendants are about to fraudulently conceal, remove, and dispose of their property and effects so as to hinder and delay their creditors. Debt sworn to, $1,500.53, for goods sold.

On March 10th, 1882, garnishment was served on Charles Stewart, receiver.

On April 10th, 1882, defendants file plea in abatement to the attachment.

On December 9th, 1882, attachment dismissed for want of prosecution; judgment dissolving attachment and for costs against the plaintiff.

On December 23rd, 1882, judgment rendered for plaintiff for $1,606.33. This case is numbered 2062.

On March 10th, 1882, the Leavenworth Sugar Company,
413 by Strong & Middlebrook, their attorneys, bring suit against the same defendants by attachment; amount sworn to in affidavit, $2,571.02. Grounds for attachment set out in affidavit were that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Garnishment was served on Charles Stewart, receiver, on March 13th, 1882. On April 10th, 1882, defendants file plea in abatement to attachment, denying under oath the grounds set out in the affidavit for attachment.

On December 13th, 1882, plaintiffs dismiss attachment; judgment against plaintiffs for costs and for dissolution of attachment, and judgment for plaintiffs for $2,680.48. This case is numbered 2067.

On March 13th, 1882, the Continental Sugar Refinery, by Strong & Middlebrook, filed their suit against the same defendants, and they also presented a petition for leave to garnishee Charles Stewart, receiver of Benedict, Melone & Co. The said petition and the order thereupon granted are in the words and figures following, to wit:

In the Circuit Court of Jackson County, Mo., at Kansas City.

CONTINENTAL SUGAR REFINERY, Plaintiff,

vs.

C. H. BENEDICT, R. A. MELONE, & J. B. MELONE, Defendants.

Attachment in civil action.

Now comes Joseph T. Greenless, who, being sworn, on his oath says that he is the agent at Kansas City for the above-named plaintiff; that said plaintiff is now and was at the dates hereinafter mentioned a corporation duly organized under the corporation laws of the State of Massachusetts and doing business in the city of
414 Boston, in said State of Massachusetts; that said plaintiff began in this court its suit in attachment against Charles H. Benedict, J. B. Melone, and R. A. Melone, as partners, doing business in Kansas City, Missouri, under the firm name and style of Benedict, Melone & Co., for the recovery of eleven hundred and seventy-four and $\frac{10}{100}$ dollars and costs, and that a writ of attachment is now ready to be placed in the hands of the sheriff of said Jackson county at once; that late in the day of February 16th, 1882, said defendants, by Richard A. Melone, made to one Charles Stewart a deed of trust in the nature of a mortgage to secure debts owing to said firm of Benedict, Melone & Co. as follows:

To Kansas City Savings Association	$11,500 00
To Bank of Kansas City	6,000 00
To Citizens' National Bank	1,500 00

All of said Kansas City, and said trustee at once took possession of the stock of goods and the assets of the defendants held by them as partners. On the same 16th day of February said C. H. Benedict,

one of the defendants, began suit in this court for the purpose of causing their partnership affairs to be wound up, and asked in his petition to have a receiver appointed for that purpose. Whereupon the Hon. Turner A. Gill, one of the judges of said court, appointed said Charles Stewart receiver, and required a bond to be given by him in the sum of $2,500.00, which bond was given and approved by said judge on February 17th, 1882, and said Stewart has possession of all of said stock of goods and all other assets of every description formerly belonging to and controlled by said partnership, claiming to hold them, as affiant is informed and believes, under said deed of trust for the benefit of the beneficiaries named therein, and as said receiver, affiant is informed and believes, that the giving of said deed of trust and the commencement of said suit to wind up said partnership and to have a receiver appointed were parts of one and the same scheme and
415 transaction, under the advice of the same counsel, to give said three banks a preference and priority to secure payment to them of $19,000.00 and leave other firm creditors, including these plaintiffs, to come in in *pro rata* payment out of whatever balance may remain, if any, out of the assets of said firm after paying off said banks. Affiant further says that it is given out by and on behalf of said defendants and by their counsel that said firm owes about $30,000.00, including said bank debts, as he is informed, and that their assets are worth about $65,000.00; but from other information obtained by affiant and by him regarded as reliable he doubts whether defendants are in such good financial condition, and believes that said firm will prove insolvent, and that their assets will not pay their liabilities, and that said deed of trust was given under such circumstances that it is fraudulent in law against other creditors of said firm defendants. Affiant makes this affidavit with a view to obtain an order in said suit to wind up said partnership, allowing plaintiff herein to garnishee said Charles Stewart so as to lay the foundation to contest the validity of said deed of trust, and of the appointment of the receiver, and such other rights as plaintiff herein may be entitled to.

JOS. T. GREENLESS.

Subscribed and sworn to before me this 11th day of March, 1882. My commission expires May 13th, 1884.

[SEAL.] W. J. STRONG,
Notary Public.

In the Circuit Court of Jackson County, Mo., Sitting at Kansas City.

CHARLES H. BENEDICT *et al.*, Pl'ffs,
vs.
R. A. MELONE *et al.*, Def'ts.

416 On reading the foregoing affidavit it is now ordered that said Continental Sugar Refinery have leave to garnishee said Charles Stewart, the receiver appointed in this cause.

March 11th, 1882.

TURNER A. GILL, *Judge.*

STATE OF MISSOURI, } ss:
County of Jackson, }

I, L. F. McCoy, clerk of the circuit court of Jackson county, Missouri, hereby certify that the foregoing is a full, true, and complete copy of the leave to garnishee Chas. Stewart, receiver, in case of Continental Sugar Refinery *vs.* Benedict, Melone & Co., as the same appears on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in Kansas City, Missouri, this 26th day of March, A. D. 1884.

[SEAL.] ——. ——,
——. ——.

Debt sworn to, $1,174.10. Charles Stewart, receiver, garnisheed March 13th, 1882. Ground for attachment, that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Affidavit made before W. J. Strong, notary public. On April 10th, 1882, defendants file plea in abatement. On the same day plaintiffs file interrogatories to Charles Stewart. On December 9th, 1882, plea in abatement tried by the court and judgment rendered for the defendants dissolving the attachment and for costs. Judgment for plaintiffs for debt, $1,167.94. This — No. 2072.

On March 13th, 1882, the Standard Sugar Refinery bring suit by attachment against the same parties, by the same attorneys, with the same affidavit filed as in the preceding case, to
417 get leave to sue and garnishee the receiver, Stewart. Amount sworn to in affidavit for attachment, $997.96. Ground for attachment was that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Stewart, receiver, garnisheed March 13th, 1882.

On April 10th, 1882, defendants file plea in abatement to the attachment denying, under oath, the grounds for attachment set out in plaintiffs' affidavit for attachment. On December 13th, 1882, plaintiffs dismiss attachment proceedings; judgment against plaintiffs dissolving the attachment, and for the costs of attachment, and on the same day judgment for the plaintiffs on the merits for $1,042.82. This is case No. 2073.

On March 13th, 1882, Arbuckle Brothers brought their suit by attachment against the same defendants. Debt sworn to, $1,691.88. Ground for attachment, that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Garnishment served on Charles Stewart, receiver, on March 13th, 1883. Plea in abatement to the attachment denying the grounds alleged in affidavit for attachment made under oath and filed March 10th, 1882.

On December 9th, 1882, plea in abatement submitted to court. Judgment rendered thereon for the defendants dissolving the attachment. Judgment for plaintiffs for debt on the same day rendered for $1,766.58. . Strong & Middlebrook, attorneys for plaintiffs. This — case No. 2074.

On March 13th, 1882, Proctor & Gamble, by their attorneys, Strong & Middlebrook, brought suit by attachment against the same parties, filing the same petition for leave to garnishee Stewart, the receiver, debt sworn to being $86.76; ground for attachment was
418 that the defendants had fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Stewart, receiver, garnisheed March 13th, 1882. On April 10th, 1882, defendants filed plea in abatement to the attachment denying the grounds sworn to in the affidavit for attachment.

On December 13th, 1882, plaintiffs dismiss the said attachment, and judgment was rendered dissolving the said attachment, and judgment was rendered for plaintiffs for $90.10. On March 13th, 1882, Samuel J. Wilson, assignee of the Farmers' and Traders' Bank of Macon, Missouri, brought suit by attachment against the same defendants, the debt sworn to being $5,631.51. Adams & Stubenraugh and C. L. Dobson, attorneys for the plaintiff. Ground for the attachment was that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors; that the defendants have fraudulently concealed, removed, and disposed of their property and effects so as to hinder and delay their creditors; that the defendants are about fraudulently to convey or assign their property or effects so as to hinder or delay their creditors; that the defendants are about fraudulently to conceal, remove, or dispose of their property or effects so as to hinder or delay their creditors; that the debts sued for were fraudulently contracted on the part of the debtors, Benedict, Melone & Co. On March 14th, 1882, garnishment was served on Charles Stewart, receiver, and on Charles Stewart. On April 10th, 1882, defendants filed plea in abatement to the attachment denying under oath the grounds set out therefor in the affidavit for attachment. On October 12th, 1882, parties waive a jury trial. December 13th, 1882, plea in abatement tried; judgment rendered for defendant dissolving attachment. The following persons filed motions to be made parties defendant and for leave to defend this suit: H. C. & C. Durand,
419 on October 27th, '82, and Ridenour, Baker & Co., Samuel Cupples & Co., the Wilson & McCully Tobacco Company, Liggett & Meyer Tobacco Company, and the Consolidated Tank Line Company. These motions were sustained. Stewart, receiver, was also made a party defendant, with leave to defend the suit. The parties filed several answers to the said suit on the merits; motions were made to strike out these answers; motions were overruled and excepted to, and the plaintiff thereupon replied to the several answers filed.

On April 10th, 1883, jury trial was waived. On June 23rd, 1883, judgment was rendered for plaintiff for debt, $5,994.99, to be paid out of the partnership assets after all other partnership debts were paid in full. On the same day, June 23rd, 1883, plaintiff filed motion for new trial, and on June 30th, 1883, plaintiff filed affidavit of C. L. Dobson in support of motion for new trial; motion *not* new trial overruled and excepted to; leave to file bill of exceptions

on or before September 1st, 1883, and the bill of exceptions filed; case now in the Supreme Court undetermined. This is case No. 2077.

On March 14th, 1882, Payton Y. Hart and W. R. Powell, by Peak & Yeager, their attorneys, bring suit against the same defendants on a note for $1,000.00. No attachment was issued, and on April 20th, '82, judgment was rendered for plaintiffs for $1,222.00. This is case No. 2081.

The Boston Sugar Refinery Company, plaintiff, by Gage, Ladd & Small, its attorneys, on March 16th, 1882, brought suit by attachment against the same defendants; amount sworn to, $2,347.76; ground of attachment, that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors; that the defendants have fraudulently concealed, removed, and disposed of their property and effects
420 so as to hinder and delay their creditors; garnishment served on Charles Stewart, receiver, and on Charles Stewart, on March 16th, 1882; plea in abatement to the attachment filed by the defendants April 10th, 1882, denying under oath the grounds for attachment set out in the affidavit; on December 9th, 1822, plea in abatement submitted to the court, judgment rendered for the defendants, and that the attachment be dissolved, and for costs against the plaintiff; on December 18th, 1882, judgment rendered on the merits for plaintiff for $2,453.53. This is case No. 2090.

On March 17th, 1882, Henry Kesting, by Lathrop & Smith, his attorneys, brought suit against the same defendants by attachment; debt sworn to, $350.00. Ground for attachment, that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. On March 17th, 1882, garnishment served on Charles Stewart, receiver, and on Charles Stewart. Plea in abatement filed to the attachment April 10th, 1882, denying under oath the grounds sworn to by plaintiff. On December 14th, 1882, plaintiff dismissed the attachment, and judgment was rendered for dissolution of the attachment and for costs against plaintiff. Judgment rendered for the plaintiff on the merits for $365.77. This is case 2094.

On March 17th, 1882, the Union National Bank of Chicago brought suit by attachment against the same parties, debt sworn to being $1,500.00. Affidavit for attachment states the grounds therefor to be that the defendants, C. H. Benedict, J. B. Melone, and R. A. Melone, doing business as Benedict, Melone & Co., have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Garnishment served on Charles Stewart and on Charles Stewart, receiver, on March 17th, 1882. On April 10th, 1882, defendants file motion to dissolve attach-
421 ment and plea in abatement to the attachment, denying under oath the grounds sworn to in the affidavit. On December 13th, 1882, plaintiff dismisses its attachment. Judgment for dissolution of the attachment and for costs against the plaintiff and on merits, in favor of plaintiff, for $1,509.43, —— —— being attorneys for the plaintiff. This is case No. 2095.

On March 17th, 1882, W. F. McLaughlin, by Lathrop & Smith, his attorneys, brought suit by attachment against the same defendants, debt sworn to being $133.89. Ground for attachment, that the defendants have fraudulently conveyed, assigned, and disposed of their property and effects so as to hinder and delay their creditors. Garnishment served on Charles Stewart, receiver, and on Charles Stewart, on March 17th, 1882. On April 10th, 1882, defendants file plea in abatement to the attachment, denying under oath the grounds set out in the affidavit for attachment. On December 14th, 1882, plaintiffs dismiss their attachment. Plea in abatement sustained; judgment for dissolution of the attachment, and judgment on the merits for the plaintiffs for $138.44. This is case No. 2093.

On March 17th, 1882, Henry C. Bannard and Bennet Lyman, by Lathrop & Smith, their attorneys, brought suit by attachment against the same defendants, debt sworn to being $625.25. Ground for attachment was that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Garnishment served on Charles Stewart and Charles Stewart, receiver, on March 17th, 1882. On April 10th, 1882, defendants file plea in abatement to the attachment, denying under oath the grounds set out in the affidavit for the attachment. On December 13th, 1882, plaintiffs dismiss their attachment. Judgment rendered for the costs of attachment against plaintiffs and for
422 dissolution of the attachment, and judgment for plaintiff on the merits for $652.89. This is case No. 2097.

On March 18th, 1882, H. C. & C. Durand, by Holmes & Ward, their attorneys, brought suit by attachment against the same defendants, debt sworn to being $1,200.00. The ground for attachment was that the defendants have fraudulently conveyed and assigned their property and effects so as to hinder and delay their creditors. Stewart, receiver, garnisheed on March 18th, 1882. On April 10th, 1882, defendants file plea in abatement to the attachment, denying under oath the grounds set out in the affidavit for attachment. On December 13th, 1882, the plaintiffs dismissed the attachment; judgment rendered for its dissolution accordingly, and judgment rendered for plaintiffs for the debt, $1,256.89. This is case No. 2105.

On March 21st, 1882, Webb M. Rubey, assignee of the Macon Savings Bank, by B. R. Dysart, Mr. Mitchell, and A. F. Denny, his attorneys, brought suit by summons against the same defendants. On October 19th 1882, J. B. Melone and R. A. Melone file answers admitting the petition. On November 1st, 1882, Stewart, receiver, files motion to be made defendant and for leave to answer; motion sustained and Stewart, receiver, files answer November 11th, 1882; case tried May 18th, 1883; judgment rendered for plaintiff for $23,850.53. The debt sued on is described as follows:

Be it remembered that on the 25th day of March, 1882, there was filed in the office of the clerk of the circuit court a petition wherein the Farmers' Bank of Bowling Green is plaintiff and Charles Stewart, receiver of Benedict, Melone & Co., —. Said petition is as follows, to wit:

In the Circuit Court of Jackson County, at Kansas City, Missouri, to the April Term, 1882.

423 FARMERS' BANK OF BOWLING GREEN, Plaintiff,

vs.

CHARLES STEWART, Defendant.

Plaintiff, for its cause of action, states that at the times hereinafter mentioned it was and ever since has been a banking corporation duly organized under and by virtue of the laws of the State of Missouri.

That on the — day of February, 1882, Benedict, Melone & Co., a corporation composed of Charles H. Benedict, R. A. Melone, and J. B. Melone, by their certain deed of mortgage (a copy of which is herewith filed, the original not being in the possession of the plaintiff), conveyed and turned over to the defendant, Chas. Stewart, all of their goods, wares, and merchandise being and situated in their store-room, No. 304 Delaware street, Kansas City, Mo., in trust for the payment of about the sum of nineteen thousand dollars alleged to be due to the Bank of Kansas City, a banking corporation duly organized, and to the Kansas City Savings Association, and the Citizens National Bank of Kansas City, Mo., banking corporations duly organized.

And that said deed, among other things, provides that the said defendant should immediately enter upon his duties and to take actual possession of said stock of goods and to convert the same into money in any manner he might think proper, and to pay said sums due said banks within five days.

That on the same day the said Charles H. Benedict commenced his action in the circuit court of Jackson county, Missouri, against his said copartners, R. A. Melone and J. B. Melone, wherein he alleged the condition of said firm, and that said firm wished to retire from business, and that he and his said copartners could not agree as to the manner of winding up their said business, and asking that a receiver might be appointed to take charge of all the assets
424 belonging to the said firm, and that said receiver shall proceed to realize upon said assets and pay all debts that might be owing by said firm; that upon a hearing thereof before Judge T. A. Gill, in chambers, the said defendant was appointed receiver, and the said defendant immediately qualified as such receiver and entered upon the discharge of his duties as such receiver; that at the time of making said deed of mortgage, and at the time of filing said suit for the appointment of a receiver, the said firm of Benedict, Melone & Co. was and still is insolvent, they well knowing that they would be unable to pay all their creditors in full. Plaintiff states that said defendant at once took charge of all assets belonging to said late firm, and that he has already realized some thirty-five thousand dollars, and has a large portion of said goods, etc., on hand.

That said defendant will be able to collect a sum sufficient to pay all creditors provided, if so applied to, about sixty per cent. of their respective claims.

Plaintiff alleges that the said Benedict, Melone & Co., by virtue of their said deed of mortgage and by virtue of their said bill to dissolve said firm, did dissolve and turn over to the said defendant, Stewart, all their property and assets for the benefit of all their creditors in compliance with the statutes in such cases made and provided, and that said defendant, in pursuance thereof, has taken possession of the assets, but has wholly failed and neglected to perform his duties as such assignee, in this, to wit:

That said defendant has failed to give the bond required as assignee by the terms of the statutes in such cases made and provided, and that the said defendant, well knowing that the assets of said firm were insufficient to pay all creditors in full, has, contrary to the statutes, proceeded to pay some of the creditors in full, to wit,
425 the said Bank of Kansas City, the said Kansas City Savings Association, and the said Citizens National Bank; that the said defendant has failed to give time and notice of the time and place where he would, as such assignee, proceed to allow and adjust any and all claims against said Benedict, Melone & Co.

Plaintiff states that the said defendant has failed and refused to comply with the statutes regulating assignments, and is proceeding to wind up the affairs of said copartnership by virtue of said appointment of receiver.

That said firm is insolvent, and that the plaintiff is a creditor of the said firm of Benedict, Melone & Co., and that at the time of making said deed of mortgage and at the time of bringing said suit to dissolve said copartnership they were indebted to this plaintiff in the sum of fifteen hundred dollars for money paid and advanced by this plaintiff upon their certain bill of acceptance of a certain draft drawn by the said J. B. Melone, dated January 19th, 1882, payable sixty days after date to the order of Macon Savings' Bank and drawn on said Benedict, Malone & Co., which said draft and acceptance was sold and discounted to this plaintiff in the regular course of business before maturity.

Plaintiff says it brings this suit for itself and all other creditors that may wish to join herein. Wherefore plaintiff asks that said deed of mortgage may be declared to be an assignment made for the benefit of the creditors of the said firm of Benedict, Melone & Co., and that the said defendant may be declared to be assignee, and that he may be required to give bond in pursuance of the statutes in such cases made and provided, and that he be required to account for all moneys and property that may have come into his hands, and that he be required to allow and adjust all claims against
426 said firm and to pay out of the assets received by him a *pro rata* amount upon all claims that the said firm of Benedict, Malone & Co. owed at the time of making said deed of mortgage, and for such other and further relief as to the court may seem meet and just.

PEAK & YEAGER,
Atty's for Plaintiff.

Be it remembered that on the 11th day of April, 1883, the follow-

ing proceedings were made of record in the cause entitled Farmers' Bank of Bowling Green *vs.* Charles Stewart, 2222:

This day comes plaintiff, by attorney, and files amended petition herein.

Said amended petition is as follows, to wit:

In the Circuit Court of Jackson County, at Kansas City, Mo., to April Term, 1882.

FARMERS' BANK OF BOWLING GREEN, Plaintiff,

vs.

CHARLES STEWART, Defendant.

Plaintiff, for its amended petition (leave of court having been first — and obtained), states that at the times hereinafter mentioned it was and ever since has been a banking corporation, duly and legally organized under and by virtue of the laws of the State of Missouri; that on the 16th day of February, 1882, Benedict, Melone & Co., a firm composed of Charles H. Benedict, R. A. Melone, and J. B. Melone, by their certain deed of mortgage (a copy of which is herewith filed, the original not being in the possession of the plaintiff), granted, bargained, sold, and delivered to the defendant, Charles Stewart, all their goods, wares, and merchandise, of whatever character or description, being and situate in their store-room, No.
427 304 Delaware street, in Kansas City, Mo., and all their store fixtures, desks, scales, delivery wagons, horses, and harness, and also all notes, accounts, and bills receivable due or to become due said firm from any parties whatever, in trust, for the purpose of securing the payment of divers sums of money, amounting in the aggregate to about $19,000.00, which the said firm was then owing to the Bank of Kansas City, the Kansas City Savings Association, and the Citizens' National Bank, all being corporations duly organized and creditors of said firm of Benedict, Melone & Co.; said deed of mortgage conveyed to the defendant, Chas. Stewart, for the purpose aforesaid, all the property and assets of any kind and description whatever belonging to said firm of Benedict, Melone & Co., and provided, among other things, that the said defendant should enter immediately upon the duties of his office and take actual possession of all the property conveyed by said mortgage and convert the same into money in any manner he might think proper, and pay the sums due to the aforementioned banks within five days after the same should become due and payable, and should pay the surplus, if any, after defraying the expenses of said trust, to the aforesaid firm of Benedict, Melone & Co.; that on the said 16th day of February, 1882, the said Charles H. Benedict, one of the members of the aforesaid firm of Benedict, Melone & Co., commenced his certain action in the circuit court of Jackson county, Missouri, against his said copartners, R. A. Melone & J. B. Melone, alleging, among other things, that the said plaintiff had dissolved the partnership existing between the members of said firm; that the said J. B. Melone had become insolvent; that the said

plaintiff, together with the defendants in said action, had control of a large stock of goods, wares, and merchandise and debts due said firm, and that said firm was largely indebted to various persons from whom said firm had purchased goods, and
428 praying the court for the appointment of a receiver for partnership property and for the ascertainment and payment of partnership debts; that upon a hearing thereof before Hon. Turner A. Gill, one of the judges of the circuit court of Jackson county, in chambers, the said defendant, Charles Stewart, was appointed receiver for the partnership property of said firm and immediately qualified and entered upon his duties as such receiver, and the said firm thereupon became dissolved and ceased to do business; that at the time of making said deed of mortgage and at the time of filing said suit for the appointment of a receiver for partnership property the said firm of Benedict, Melone & Co. was and still is largely indebted to various persons besides those mentioned in said deed of mortgage, and the said firm then was and still is wholly insolvent and unable to pay all their creditors in full, and said firm at the time had full knowledge of such insolvency. Plaintiff states that said defendant at once took charge of all the assets belonging to the said late firm, and that he has realized about thirty-five thousand dollars out of said assets and still has a large portion of said goods, wares, and merchandise on hand undisposed of.

That said defendant will be able to collect and realize out of said assets in his hands a sum sufficient to pay all the creditors of said firm, if so applied, about sixty per cent. of their respective claims. Plaintiff alleges that the said Benedict, Melone & Co., by virtue of their said deed of mortgage and by virtue of their said bill for the dissolution of said firm and the appointment of a receiver for partnership property, did assign and turn over to this said defendant, Charles Stewart, as assignee, all their property & assets for the benefit of all their creditors in compliance with the statutes in such cases made and provided, and that said deed of mortgage and
429 said bill for the dissolution of copartnership and the appointment of a receiver for partnership property operated in law as an assignment to the said defendant, Charles Stewart, for the benefit of all the creditors of said firm of Benedict, Melone & Co., and that in pursuance thereof the said defendant has taken possession and control of all the property and assets of the said firm of Benedict, Melone & Co., but has wholly failed and neglected to perform his duties as such assignee, in this, to wit:

That the said defendant has failed and neglected to give the bond as assignee required by the terms of the statute in such cases made and provided.

That the said defendant, well knowing that the property and assets of said firm of Benedict, Melone & Co. were insufficient to pay all the creditors of said firm in full, has, contrary to the provisions of the statute, proceeded to pay some of the creditors of said firm in full, to wit, the said Bank of Kansas City, the said Kansas City Savings Association, and the said Citizens' National Bank.

That the said defendant has failed and neglected to give notice, as

required by the statute, of the time and place when and where he would, as such assignee, proceed to allow and adjust any and all claims against the said firm of Benedict, Melone & Co.; that the said defendant has wholly failed and refused to comply with the terms of the statutes regulating assignments for the benefit of creditors, and is proceeding to wind up and settle the affairs of the copartnership by virtue of the powers conferred by said deed of mortgage and by virtue of his said appointment as receiver for partnership property.

Plaintiff alleges that the said firm of Benedict, Melone & Co. is, and at the time of making said deed of mortgage and of bringing said suit for the dissolution of said copartnership and appointment
430 of a receiver was, insolvent, and that this plaintiff is and was at said time a creditor of said firm; that the said firm is and was at said time indebted to this plaintiff in the sum of fifteen hundred dollars for money paid and advanced by this plaintiff upon their certain acceptance of a certain draft drawn by the said J. B. Melone, dated January 19th, 1882, payable sixty days after date to the order of the Macon Savings Bank and drawn on said Benedict, Melone & Co. and duly accepted by said Benedict, Malone & Co., and that said draft so accepted was sold and discounted to this plaintiff in the regular course of business, for value, before maturity; that said draft is due and remains wholly unpaid. Plaintiff says it brings this suit for the benefit of itself and all other creditors of the said firm of Benedict, Melone & Co. who may wish to join herein.

Wherefore plaintiff asks that the said deed of mortgage to the said defendant and the appointment of the said defendant as receiver of the partnership property of the said firm of Benedict, Melone & Co. may be declared to be and operate as an assignment for the benefit of all the creditors of the said firm of Benedict, Melone & Co., and that said defendant may be declared to be the assignee of said firm for the benefit of creditors, and that said defendant may be required to give bond as such assignee in pursuance of the statutes in such cases made and provided, and that he be required to account for all moneys and property of this said firm of Benedict, Melone & Co. that may have come into his possession or under his control, and that he be required and directed to allow and adjust all claims against the said firm of Benedict, Melone & Co. which said firm was owing at the time of making said deed of mortgage, and that he be required and directed to use and apply this
431 money and property of said firm in his hands to the payment of all of said claims *pro rata*, and for such other and further relief — to the court may seem proper and just.

PEAK & YEAGER,
Att'ys for Plaintiff.

On the 21st day of April, 1882, the following further proceedings were made of record in said cause, to wit:

THE FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART. } 2222.

This day comes defendant, by attorney, and files demurrer to plaintiff's petition; said demurrer is as follows, to wit:

In the Jackson Circuit Court, in Jackson County, Missouri, Sitting at Kansas City, Mo.

THE FARMERS' BANK OF BOWLING GREEN, Plaintiff,
vs.
CHARLES STEWART, Defendant.

This day comes the defendant and demurs to the amended petition of the plantiff on the following grounds:

1st. There is a defect of parties to this suit. The Kansas City Savings Association, The Bank of Kansas City, Missouri, and the Citizens National Bank all being interested — the deed of trust or mortgage set up in the plaintiff's petition, *and* their interest in said deed of trust cannot be determined in this suit, corporations not being parties to this suit.

2nd. Said petition does not state facts sufficient to constitute a cause of action. Said deed of trust or mortgage and said suit of C. H. Benedict *vs.* James B. Melone and R. A. Melone, under the alle-
432 gations of said petition, do not constitute an assignment for the benefit of creditors, under the Missouri statutes or otherwise; and there is a further defect of parties, in this, that said R. A. Melone, James B. Melone, and C. H. Benedict are not parties to this suit, and this court cannot, in their absence, adjudge said deed and said suit together an assignment for the benefit of creditors. Said petition is otherwise defective and insufficient, and on the facts stated no judgment whatever can be rendered in plaintiff's favor.

KARNES & ESS
Att'ys for Def't.

On the 15th day of May, 1882, the following further proceedings were had in said cause, to wit:

FARMERS' BANK OF BOWLING GREEN, Plaintiff,
vs.
CHARLES STEWART, Defendant.

This day come the parties, by attorneys, and the demurrer to plaintiff's amended petition, being submitted to the court and argued, was by the court sustained.

On the 31st day of May, 1882, the following proceedings were had in said cause, to wit:

FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART. } 2222.

This day comes plaintiff, by attorney, and files second amended

petition making R. A. Melone, James B. Melone, C. H. Benedict, Kansas City Savings Association, Bank of Kansas City, and Citizens' National Bank parties defendants, and it is ordered that summons be awarded against said defendants, returnable to the next term of this court.

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Said second amended petition is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, at Kansas City, Mo. April Term, 1882.

FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART, R. A. MELONE, JAMES B. MELONE, C. H. BENEDICT, Kansas City Savings Association, Bank of Kansas City, and Citizens' National Bank.

Plaintiff, for its second amended petition, leave of court having been first had and obtained, states that at the times hereinafter mentioned it was and ever since has been a banking corporation duly and legally organized under and by virtue of the laws of the State of Missouri; that on the 16th day of February, 1882, and for a long time prior thereto, the defendants, R. A. Melone and J. B. Melone and C. H. Benedict, were engaged in the wholesale grocery business in the city of Kansas, Jackson county, Mo., as partners under the firm name of Benedict, Melone & Co.; that at said times and dates these defendants, The Kansas City Savings Association and The Bank of Kansas City, were and still are banking corporations duly and legally incorporated and organized under and by virtue of the laws of the State of Missouri, and the defendant, Citizens' National Bank, at said dates and times was and still is a banking corporation duly and legally organized under and by virtue of the laws of the United States; that on the 16th day of February, 1882, the defendants, R. A. Melone, James B. Melone, and C. H. Benedict, under their firm name of Benedict, Melone & Co., by their certain deed of mortgage (a copy of which is herewith filed, the original not being in the possession of the plaintiff), granted, bargained, sold, and delivered to the defendant, Charles Stewart, all their goods, wares, and merchandise, of whatever character or description, situate and being in their store-room, No. 304 Delaware street, in Kansas City, Mo., and all their store fixtures, desks, scales, delivery wagon, horses and harness; and also all notes, accounts, and bills receivable due or to become due to said firm of Benedict, Melone & Co. from any parties whatever, in trust, for the purpose of securing the payment of divers sums of money, amounting in the aggregate to about nineteen thousand ($19,000.00) dollars, which the said defendants, R. A. Melone, J. B. Melone, and C. H. Benedict, under their firm name of Benedict, Melone & Co., were then owing their codefendants, The Bank of Kansas City, The Kansas City Savings Association, and The Citizens' National Bank, all being corporations as aforesaid and creditors of the said firm of Benedict, Melone & Co. Said deed of mortgage conveyed to the said defendant, Charles Stew-

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art, for the purposes aforesaid, all the property and assets of every kind and description whatever belonging to the said defendants, R. A. Melone, J. B. Melone, and C. H. Benedict, under the firm name of Benedict, Melone & Co., and provided, among other things, that the said defendant, Charles Stewart, should enter immediately upon the duties of his office and take actual possession of all the property conveyed by said mortgage and convert the same into money in any manner he might think proper, and pay the sums due to his said co-defendants, The Bank of Kansas City, The Kansas City Savings Association, and The Citizens' National Bank, within five days after the same should become due and payable, and should pay the surplus, if any, after defraying the expenses of said trust, to his said
435 codefendants, the said R. A. Melone, J. B. Melone, and C. H. Benedict, under their firm name of Benedict, Melone & Co.; that on the said 16th day of February, 1882, the said defendant, C. H. Benedict, one of the members of the aforesaid firm of Benedict, Melone & Co., commenced his certain action in the circuit court of Jackson county, Missouri, against the said defendants, J. B. Melone and R. A. Melone, his copartners as aforesaid, alleging, among other things, that he, the said C. H. Benedict, plaintiff in said action, had dissolved the partnership existing between the members of the said firm of Benedict, Melone & Co.; that the said J. B. Melone had become insolvent; that the said plaintiff, together with the said defendants in said action, had control of a large stock of goods, wares, and merchandise and debts due said firm, and that said firm was largely indebted to various persons from whom said firm had purchased goods, and praying the court for the appointment of a receiver for partnership property and for the ascertainment and payment of partnership debts; that upon the hearing thereof before the Hon. Turner A. Gill, one of the judges of the circuit court of Jackson county, in chambers, the said defendant, Charles Stewart, was appointed receiver for the partnership property of the said firm of Benedict, Melone & Co., composed, as aforesaid, of the defendants R. A. Melone, J. B. Melone, and C. H. Benedict, and immediately qualified and entered upon his duties as such receiver, and the said firm thereupon became dissolved and ceased to do business. Plaintiff states and charges that at the time of making said deed of mortgage and at the time of filing said suit for the appointment of a receiver for partnership property the said firm of Benedict, Melone & Co., composed, as aforesaid, of the defendants, R. A. Melone, J. B. Melone, and C. H. Benedict, was and still is largely indebted to various persons besides those mentioned in said deed of mortgage, and that the said firm then was and still is wholly
436 insolvent and unable to pay all their creditors in full, and said firm and all the defendants herein had full knowledge of such insolvency; that at the time of making said deed of mortgage to the defendant, Charles Stewart, for the purpose of securing the payment of the debts due to the defendants, The Bank of Kansas City, The Kansas City Savings Association, and The Citizens' National Bank, it was fully understood by and between all the defendants herein that the said firm of Benedict, Melone & Co., com-

posed as aforesaid, was wholly insolvent and was to be immediately dissolved, and that the said Charles Stewart, trustee in said deed of mortgage, was to be appointed receiver for the partnership property of the said firm, and that the action of the defendants in making said mortgage and in dissolving said partnership and in having the said Charles Stewart appointed receiver for said partnership property was a fraudulent attempt on the part of said defendants to evade the provisions of the statute in reference to voluntary assignments for the benefit of creditors. Plaintiff states that the said defendant, Charles Stewart, has taken possession, charge, and control of all the assets belonging to the late firm of Benedict, Melone & Co., and that he has realized about fifty thousand dollars out of said assets, and that he will be able to pay all the creditors of said firm of Benedict, Melone & Co., if so applied, about sixty per cent. of their respective claims. Plaintiff alleges that the said Benedict, Melone & Co., composed, as aforesaid, of the defendants, R. A. Melone, J. B. Melone, and C. H. Benedict, by virtue of their said deed of mortgage and by virtue of their said bill for the dissolution of said firm and appointment of a receiver for partnership property, did assign and turn over to said defendant, Charles Stewart, as assignee, all their property and assets for the benefit of all their creditors, in compliance with
437 the statutes in such cases made and provided, and that said deed of mortgage and said bill for the dissolution of copartnership and the appointment of a receiver for partnership property operated in law as an assignment to the said defendant, Charles Stewart, for the benefit of the said creditors of the said firm of Benedict, Melone & Co., and that in pursuance thereof the said defendant, Charles Stewart, has taken possession and control of all the property and assets of the said firm of Benedict, Melone & Co., composed, as aforesaid, of the defendants, R. A. Melone, J. B. Melone, and C. H. Benedict, but has wholly failed, refused, and neglected to perform his duties as such assignee, in this, to wit, that said defendant, Charles Stewart, has failed and neglected to give the bond as assignee, as required by the terms of the statutes in such cases made and provided; that the said defendant, Charles Stewart, well knowing that the property and assets of the said firm of Benedict, Melone & Co. were insufficient to pay all the creditors of the said firm in full, has, contrary to the provisions of the statutes, proceeded to pay the said defendants, The Kansas City Savings Association, The Bank of Kansas City, and The Citizens' National Bank, in full; that the said defendant, Charles Stewart, has failed and neglected to give notice, as required by the statutes, of the time and place where and when he would, as such assignee, proceed to allow and adjust any and all claims against the said firm of Benedict, Melone & Co. The said defendant, Charles Stewart, has wholly failed and refused to comply with the terms of the statutes regulating assignments for the benefit of creditors, and is proceeding to wind up and settle the affairs of said copartnership by virtue of the powers conferred by said deed of mortgage and by virtue of his appointment as receiver of partnership property.

438 Plaintiff alleges that said defendants, R. A. Melone, J. B. Melone, and C. H. Benedict, at the time of making said deed of mortgage and at the time of the bringing of said suit for the dissolution of the copartnership of Benedict, Melone & Co. and the appointment of a receiver for the partnership property of said firm, was wholly insolvent, and that this plaintiff is and was a creditor at said time of the firm of Benedict, Melone & Co.; that the said defendants, R. A. Melone, J. B. Melone, and C. H. Benedict were at said time indebted to this plaintiff, in their firm name of Benedict, Melone & Co., in the sum of fifteen hundred dollars for money loaned and advanced by this plaintiff upon a certain acceptance by the said firm of a certain draft for fifteen hundred dollars, drawn by the defendant, J. B. Melone, dated January 19th, 1882, payable sixty days after date to the order of Macon Savings Bank and drawn on the said firm of Benedict, Melone & Co., and that said draft so accepted was sold and discounted to this plaintiff in the regular course of business, for value, before maturity; that said draft is due and remains wholly unpaid and is the property of this plaintiff.

Plaintiff says it brings this suit for the benefit of itself and all other creditors of the said firm of Benedict, Melone & Co. who may wish to join herein. Wherefore plaintiff asks that the said deed of mortgage to said defendant, Charles Stewart, and the appointment of said defendant, Charles Stewart, receiver of the partnership property of the firm of Benedict, Melone & Co. may be declared to be and operate as an assignment for the benefit of all the creditors of the said firm of Benedict, Melone & Co., and that said defendant, Charles Stewart, be declared the assignee of said firm of Benedict, Melone & Co. for the benefit of creditors, and that said defendant, Charles

439 Stewart, may be required to give bond as such assignee in pursuance of the statutes in such cases made and provided, and that he be required to account for all moneys and property of the said firm of Benedict, Melone & Co. that may have come into his possession or under his control, and that he may be required to adjust and allow all claims against the said firm of Benedict, Melone & Co. which said firm was owing at the time of making said deed of mortgage, and that he be required and directed to use and apply the money and property of said firm in his hands to the payment of all of said claims *pro rata*, and that the said defendants, The Bank of Kansas City, The Kansas City Savings Association, and The Citizens' National Bank, be required and adjudged to refund to the said defendant, Charles Stewart, all sums received by said defendants from defendant, Charles Stewart, in pursuance of the terms of said deed of mortgage, and for such other and further relief as to the court may seem proper and just.

PEAK & YEAGER,
Attorneys for Plaintiff.

On the 10th day of October, 1882, the following further proceedings were made of record in said cause, to wit:

FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART *et al.*

This day comes defendants, by attorney, and leave is given them to plead in this cause within ten days.

On the 27th day of October, 1882, the following further proceedings were made of record in said cause:

440 FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART *et al.* } 2222.

This day come defendants, The Bank of Kansas City, The Citizens' National Bank, and Charles Stewart, by attorneys, and the said Bank of Kansas City files demurrer to plaintiff's petition, and the said defendants, The Citizens' Bank and Charles Stewart, file their joint demurrer to plaintiff's petition.

Said demurrer of Charles Stewart and Citizens' National Bank is in words and figures as follows, to wit:

In the Circuit Court of Jackson County, at Kansas City, Missouri.

FARMERS' BANK OF BOWLING GREEN, Plaintiffs,
vs.
CITIZENS' NATIONAL BANK *et al.*, Defendants.

Now come The Citizens' National Bank, Chas. Stewart, and The Kansas City Savings Association, defendants in the above-entitled cause, and demur to plaintiff's petition for the reasons—

First. That it fails to state facts sufficient to constitute a cause of action against these defendants.

Second. That it does not appear that there was any assignment by the firm of Benedict, Melone & Co. for the benefit of their creditors or any attempt at such assignment by them made which the court can execute or which will authorize the relief prayed for.

Third. The relief asked for is improper and cannot be obtained by these proceedings.

TICHENOR, WARNER & DEAN,
Attorneys for Citizens' National Bank, Def'ts.

441 On the 26th day of January, 1883, the following further proceedings were made of record in said cause:

FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART *et al.* } 2222.

This day come parties, by attorneys, and plaintiff has leave to file amended petition making new parties plaintiff on or before 1st day of next term.

On the 12th day of June, 1883, the following further proceedings were made of record in said cause, to wit:

FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART *et al.* } 2222.

This day come parties, by attorneys, and submit this cause to the court upon the demurrer to the petition, and the same having been seen and heard the court doth take it under advisement.

On the 6th day of December, 1883, the following proceedings were had in said cause, to wit:

FARMERS' BANK OF BOWLING GREEN
vs.
CHARLES STEWART, R. A. MELONE, JAMES B. MELONE, C. H. BENEDICT, Kansas City Savings Association, Bank of Kansas City, and Citizens' National Bank.

Now, at this day, comes the plaintiff, by its attorneys, and says it will no further prosecute this cause, but dismisses the same.
442 It is therefore considered and adjudged by the court that plaintiff take nothing by its writ; that defendants go hence without day and have and recover of and from said plaintiff all their costs herein incurred and expended, and have therefor execution.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, L. F. McCoy, clerk of the circuit court of county and State aforesaid, hereby certify that the foregoing is a true and complete copy of the petition, amended petition, 2nd amended petition, demurrer to the 1st and second amended petitions, and all the record entrys in the case wherein The Farmers' Bank of Bowling Green is plaintiff and Chas. Stewart *et al.* are defendants as the same appears of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in Kansas City, this 25th day of March, 1884.

[SEAL.]

L. F. McCOY, *Clerk,*
By D. M. McCLANAHAN, *D. C.*

The foregoing are admitted as facts shown by the records of the circuit court of Jackson county, as shown in the caption thereof, but these matters are admitted as evidence subject to objection on the part of either party as to the relevancy or materiality of such facts, it being distinctly understood that no objection is made as to the manner of proof and as to the fact that entire copies of records are not made.

DEAN & WARNER,
KARNES & ESS,
Att'ys for Def'ts.
DOBSON & DOUGLASS,
Att'ys for Complainants.

443 UNITED STATES OF AMERICA, *sct:*

I, H. C. Geisberg, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify the foregoing to be a true and complete transcript of the record, pleadings, proceedings, and depositions in the cause therein named as fully as the same appear of record and on file in my office.

Witness my hand as clerk and the seal of said court hereto affixed.

Done at office, in Kansas City, in said division and district, this 22nd day of September, A. D. 1885.

{Seal of the United States Circuit Court, Western Division, for the Western District of Missouri.}

H. C. GEISBERG, *Clerk*,
By WARREN WATSON,
Deputy Clerk.

444 In the Supreme Court of the United States of America, held at the City of Washington, District of Columbia. In Equity.

UNION NATIONAL BANK OF CHICAGO, a Corporation; HENRY C. BANNARD and Bennett Lyman, Composing the Firm of Bannard, Lyman & Company; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., Composing the Firm of P. Lorillard & Company; Boston Sugar Refining Company; Marx W. Mendel and Emanuel W. Mendel, Composing the Firm of M. W. Mendel & Brother; John Arbuckle and William V. R. Smith, Composing the Firm of Arbuckle Brothers; Continental Sugar Refinery, a Corporation; Standard Sugar Refinery, a Corporation, and Leavenworth Sugar Company, a Corporation, Complainants,

against

BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation; and Citizens' National Bank, a Corporation; Charles Stewart, James B. Melone, Charles H. Benedict, and Richard A. Melone, Respondents.

It is hereby stipulated and agreed by and between Dobson & Douglass, of counsel for complainants, and Karnes & Ess and Warner & Dean, of counsel for respondents, that in the printing of the record in the above-entitled cause, now filed in this court and brought here on appeal by complainants from the circuit court of the United States for the western division of the western district of Missouri, the clerk of the Supreme Court shall omit the following parts thereof, to wit:

445 The whole of Exhibit "A," commencing on page 85 and ending on page 123, and the whole of the deed of trust, commencing on line 13, page 58, and ending on page 65, and also the whole of Exhibit "A" (being the last-mentioned deed), commencing on page 306 and ending on page 313, for the reason that said deeds are identically the same as the one filed with complainants' bill and copied in full on pages 15 to 22, inclusive, of said record, and said clerk is authorized to and shall so state such to be the fact at the proper places in printing said record and in lieu of printing

said deeds in full as they appear in said record, and also the three subpœnas for witnesses, C. H. Benedict, R. A. & J. B. Melone, found on pages 318 to 320, inclusive.

DOBSON & DOUGLASS,
Of Counsel for Complainants.
KARNES & ESS, WARNER & DEAN,
Of Counsel for Respondents.

[Endorsed:] U. S. Supreme Court. Union National Bank *et al. vs.* Bank of Kansas City *et al.* Stipulation as to printing record. Dobson & Douglass, for complainants, Karnes & Ess, Warner & Dean, for respondents.

Endorsed on cover: W. Missouri C. C. U. S. No. 381. The Union National Bank of Chicago, Henry C. Bannard, and Bennett Lyman, as Bannard, Lyman & Co.; Peter Lorillard, Charles Seidler, and Pierre Lorillard, Jr., as P. Lorillard & Co., *et al.*, appellants, *vs.* The Bank of Kansas City, The Bank of Commerce, The Citizens' National Bank, *et al.* Filed October 12, 1885.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

IN EQUITY.

On Appeal from the United States Circuit Court for the Western Division of the Western District of Missouri.

THE UNION NATIONAL BANK OF CHICAGO, a Corporation; HENRY C. BANNARD *et al.*, partners under the firm name of Bannard, Lyman & Company; PETER LORILLARD *et al.*, partners under the firm name of P. Lorillard & Company; MARX W. MENDEL *et al.*, partners under the firm name of M. W. Mendel & Brother; JOHN ARBUCKLE *et al.*, partners under the firm name of Arbuckle Brothers; CONTINENTAL SUGAR REFINERY, a Corporation; STANDARD SUGAR REFINERY, a Corporation; LEAVENWORTH SUGAR COMPANY, a Corporation, and BOSTON SUGAR REFINING COMPANY, a Corporation,

Appellants.

Against

THE BANK OF KANSAS CITY, a Corporation; BANK OF COMMERCE, a Corporation, and THE CITIZENS NATIONAL BANK, a Corporation; CHARLES STEWART, JAMES B. MELONE, CHARLES H. BENEDICT and RICHARD A. MELONE,

Respondents.

} No.

BRIEF AND ARGUMENT OF DOBSON & DOUGLASS,

Counsel for Appellants.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRINTERS, ALAMO BLDG.
1888.

IN THE

Supreme Court of the United States.

IN EQUITY.

THE UNION NATIONAL BANK OF CHICAGO, AND OTHERS,
Appellants,
vs.
THE BANK OF KANSAS CITY, AND OTHERS,
Respondents.
No.

BRIEF AND ARGUMENT FOR APPELLANTS, BY DOBSON & DOUGLASS.

STATEMENT OF THE CASE.

This action was begun March 23, 1883, in the Circuit Court of Jackson County, Missouri, and afterwards, on April 11, 1883, removed to the United States Circuit Court for the Western Division of the Western District of Missouri, by the complainants, who were all non-residents of Missouri.

The transcript was there filed April 30, 1883, and the case subsequently, on May 27, 1885, tried on the second amended bill. [Printed record, pages 52 to 61.]

This bill, after the proper averments as to the citizenship of the parties, the dates and amounts of the judgments in favor of complainants, and against the re-

spondents, James B. and Richard A. Melone and C. H. Benedict, the issuance of executions thereon and their return *nulla bona*, showing insolvency, sets up and contains in substance the following allegations:

That on February 16, 1882, the said Richard A. Melone, in the firm name of Benedict, Melone & Company, wholesale grocers at Kansas City, Missouri, executed a certain instrument by deed, otherwise called a deed of trust, by which was turned over, and the possession thereof, at once delivered to respondent Charles Stewart, all the partnership property, and assets of every kind whatsoever, in trust to secure his co-respondent banks in the then aggregate amount of about $19,000, and which deed was duly acknowledged by the said Richard A. Melone, for and on behalf of his firm, and recorded in the recorder's office of Jackson County, Missouri.

That simultaneously therewith, and as a part of the same transaction, the other partner, C. H. Benedict, commenced his action in the same Circuit Court against his two co-partners, alleging that he had dissolved their partnership, etc., and praying the Court for the appointment of a receiver for the partnership property, and for the ascertainment and payment of the indebtedness; and the same Stewart, trustee in said instrument, was thereupon, on that day, appointed receiver and immediately qualified, and said firm became dissolved and ceased to do business.

That said firm was then, and still continued to be insolvent, being largely indebted to firms and persons, other than the respondent banks, all of which the latter well knew.

That the said J. B. Melone resided at Macon City, Missouri, and, becoming financially embarrassed in his other business pursuits, and knowing that it would be impossible for the firm of Benedict, Melone & Co. to continue in business, by reason of his and their insolvency, he sent a special messenger to his said co-partners at Kansas City, with written directions to them to make a general assignment of all the partnership property to said Stewart for the benefit of all their creditors, which fact was known to respondents before the execution of said instrument and the appointment of the receiver; but, disregarding such directions and in violation thereof, they executed said instrument, as stated, thereby at-

tempting to create preferences in favor of the respondent banks, and as part of a general purpose, on their part, of winding up their business and turning over all their property for the benefit of their creditors.

That the said J. B. Melone was ignorant of such attempted preferences for months thereafter, and was led to believe that his directions had been followed; that he never authorized the execution of said instrument in the manner in which it was made, nor ratified the act of his co-partners as to such preferences; that, by reason of this want of authority from the said J. B. Melone to execute it, the instrument, in so far as it attempted by way of deed of trust, or mortgage, to create the bank preferences, is void, and the partnership property therein enures to and for the benefit of all the firm creditors, who have an equitable lien or charge thereon, to the extent of their several debts against the firm.

That, at the time of the making of said instrument, it was fully understood by the respondent banks and Stewart that the firm of Benedict, Melone & Co. was insolvent and was to be immediately dissolved, and said Stewart to be appointed receiver, and that, notwithstanding there was a defeasance clause in the instrument, such as is usually contained in deeds of trust in the nature of mortgages, it was in fact intended, by the aid of such receivership proceedings, to absolutely and fully dispose of all the partnership property, and appropriate and dedicate the same to the payment of the debts of the firm, after first paying the banks in full; and that all this constituted and was a fraudulent attempt on their part to evade the provisions of the statute in reference to voluntary assignments, being Chap. 5 of the Rev. Stat. of Mo.

That, by reason of the premises and of said statute, the written instrument aforesaid operated as, and is, in law and equity, a voluntary deed of assignment on the part of said firm to said Stewart for the benefit of all the firm creditors, and by virtue of it all the property named in it was assigned for their benefit in proportion of their several claims.

That said Stewart, notwithstanding his duty in the premises, had failed and refused to comply with the requirements of the assignment statute; that he had, at all times, denied the right of the complainants, and other creditors of said firm, to share equally with said banks

in the distribution of the trust estate, and had proceeded to execute his trust, by treating said instrument as a valid mortgage, preferring the banks, and out of about $58,000 received by him as the proceeds of the assigned property, he had paid them about $19,000, in full of their claims, but before doing so, and in anticipation of legal proceedings by the unsecured creditors, he had demanded and received of said banks bonds of indemnity; that they received, and said Stewart paid, the money with knowledge of complainants' rights to share therein; that said sum of $19,000 has never been accounted for by him as receiver, nor was it paid under any order or direction of the Circuit Court, which appointed him; that, as to the remainder of said proceeds, he had been distributing and paying the same *pro rata* to the other firm creditors, and in the same way he would have done had he qualified as assignee, and as to such action no complaint is made nor relief asked.

That the firm creditors were numerous, and many of them non-residents of this State, so that it was impracticable to bring them before the Court, wherefore complainants' action is brought for the benefit of all other creditors, as well as themselves, who may wish to join therein and contribute to the expenses thereof.

The prayer of the bill is that the deed in controversy be decreed to be for the benefit of all the creditors of Benedict, Melone & Co., in proportion to their respective demands, and that the respondent banks and Stewart be decreed to pay into the registry of the Court the amounts paid them by Stewart, to be distributed to all the creditors under the Court's orders, as equity and justice may require:

Or, that the deed be decreed to be a voluntary assignment for the benefit of all the creditors of Benedict, Melone & Co., in proportion to their respective claims; that Stewart be decreed to be assignee and be required to give bond as provided by law, and that the banks be compelled to pay back to him the sums of money received by them and he be required to account therefor as such assignee, and for general relief.

The respondent banks and Stewart made a joint answer, which was a general denial as to most of the averments of the bill, but admitted the execution of the written instrument in controversy and the appointment

of Stewart as receiver, and that he took possession of the partnership property mentioned in the deed, which embraced all the property known to belong to the firm, and that he paid the respondent banks the full amount due on their claims, without any order from the court in which the receivership proceeding was pending.

It also sets out that Stewart paid the banks in twenty days after the deed was made, and that this was done to save interest; that the complainants proved up their claims and received their dividends from the receiver and thereby became parties to the winding up proceeding in the State Circuit Court, etc. [Printed record, 31.]

The respondents R. A. Melone and C. H. Benedict made default.

The respondent J. B. Melone made voluntary appearance to this action and filed his separate answer, in which he admits having sent a special messenger from his home at Macon, Mo., to his co-partners at Kansas City, with written instructions and directions to them to make a general assignment of the firm property for the benefit of all their creditors, as alleged by complainants; that he was informed and thought for a long time such an assignment had been made, and that the instrument in controversy, as a preferential deed of trust in favor of the respondent banks, was made without his knowledge or consent, and in violation of his express directions as aforesaid, and that he had never assented to or ratified the same, but on the contrary had dissented therefrom and repudiated it.

He joined in the prayer of complainants' bill that all the partnership property be appropriated to the payment of the creditors *pro rata*, without any preferences or priority whatever. [Printed record, 51.]

Complainants filed replication to the joint answer of

the banks and Stewart, in which they deny that Benedict and R. A. Melone intended to and did, of their own motion, make a deed of trust for the sole benefit of said banks, and alleged that this was only done by reason of the demands and importunities of said Stewart, and the officers and attorneys of said banks, and of Stewart's refusal to act as assignee as requested by J. B. Melone. They deny R. A. Melone's authority to prefer the banks and affirm his authority to make a general assignment, etc. [Printed record, 48.]

On the issues so made, the case was tried May 27, 1885, before the Circuit Justice and the District Judge, who dismissed the bill, and, as a part of the decree, filed a certificate of division of opinion [printed record, 67 *et seq.*], which is as follows:

1. Is the instrument of writing in this case, called a deed of trust, which we find as a matter of fact conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart as trustee, as security for the banks therein named, void for the want of the assent of James B. Melone, one of the partners, which was never given to that transfer? [Here follows deed of trust.]

2. As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under Section 354 of the Revised Statutes of Missouri, 1879?

3. Does the making of that deed of trust and appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the

proceedings to adminster the assets of the insolvent partnership, to which the banks and Stewart and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors and require the receiver to administer the funds in his hands in that manner?

The complainants thereupon excepted to the action of the Court in dismissing their bill, and prosecuted their appeal to this Court.

The questions presented in the certificate of the trial Court for the determination of this Court are of law, rather than of fact, and, hence, it is not deemed necessary to encumber the record by any detailed statement of the facts appearing in the evidence, and especially so, as those of a salient and material character have been very fully recited in complainants' amended bill. Reference will only be made in the argument to such as serve to explain the points raised by said certificate.

ASSIGNMENTS OF ERROR.

The complainants assign as errors the following:

1. The trial Court erred in dismissing their bill.

2. The trial Court erred in not decreeing that the instrument in writing, called a deed of trust, and conveying all the partnership property of Benedict, Melone & Co. to Stewart for the benefit of the respondent banks, was void for want of the assent of J. B. Melone, one of the partners, which was never given.

3. The trial Court erred in not decreeing that such instrument operated as a general assignment for the benefit of all of the creditors of the partnership, James B. Melone having given his prior assent and directions to the making of an assignment.

4. The trial Court erred in not decreeing that the making of the instrument above mentioned, and the appointment of a receiver, who is the same person as the trustee, on the same day, and as a part of the proceeding to administer the assets of the insolvent partnership, to which the banks and Stewart and partners in the firm of Benedict, Melone & Co. agreed, constituted a general assignment for the benefit of all the firm creditors, and required the receiver to administer the fund in his hands in that manner.

POINTS AND AUTHORITIES.

The first point suggested by the certificate of division of opinion is this:

"Is the instrument of writing in this case, called a deed of trust, which we find as a matter of fact conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart, as trustee, as security for the banks therein named, void for want of the assent of James B. Melone, one of the partners, which was never given to that transfer?"

The complainants, who are here as appellants, contend that the instrument is void as a deed of trust or mortgage, creating preferences in favor of the respondent banks, by reason of the fact that it was made without the assent of James B. Melone, one of the partners. The respondents say it is valid as such preference without his assent.

This is the issue, briefly stated, as to the preferential feature of the deed.

The instrument in controversy is in form of a deed of trust securing the banks, and it is admitted that, if James B. Melone had assented to its execution at the time it was made, or ratified it afterwards, it would have validated the deed, so far as concerns its execution, excepting as to such persons as may have acquired rights intervening between the execution thereof and such ratification.

It stands admitted in the case that the deed was made by R. A. Melone, in the firm name of Benedict, Melone & Co., and in the presence of C. H. Benedict, but without the knowledge or assent of J. B. Melone, who had only directed the making of a general assignment for the benefit of all their creditors, and not a deed

of trust with preferences. [See his separate answer, p. 51, and his testimony, p. 78 to 81, printed record.]

The finding of the trial Court in its certificate is, that his assent was never given to the transfer, which we take as final for the purposes of this case, without reviewing the evidence bearing on the question.

In connection with the execution of the deed, the complainants contend that the authorities justify and sustain them in asserting the following propositions as the law of the case:

1. That, treating the instrument as a deed of trust with preferences, it is not properly executed to make it the act of the firm, having been made without the assent of one of its members, and the preferences therein attempted to be created are void and should be set aside.

2. That, treating the instrument as a deed of general assignment, it is properly executed to make it the firm act, inasmuch as the two resident partners participated in the transfer, and the absent one directed the assignment to be made, and ratified the transfer only as such assignment.

I.

THE INSTRUMENT AS A DEED OF TRUST, IN THE NATURE OF A MORTGAGE.

Is the instrument so executed as to make it a valid deed of trust, conveying all the firm property of Benedict, Melone & Co.? It purports to be the firm act, but is in reality only the act of two of its members, and to which the third has never assented.

The authorities are unanimous in holding that, by the act of co-partnership, the implied power of a partner over the partnership assets is limited to transactions within its business scope and objects; and they are, practically, as unanimous in holding that this implied authority is personal to the partner and cannot be delegated to another person without the assent of the other partners, and

that neither party is authorized, by virtue of the partnership relation, to appoint a trustee and interpose him between the partnership, its property and creditors, thereby, ipso facto, dissolving the partnership, and placing its property in the hands of third persons for sale and disposition. Transfers, made in conducting the business of the firm, are in exercise of a power to preserve, while such as necessarily mean dissolution are in the exercise of a power to destroy, and, to validate the latter a special authorization must be shown as to all the partners.

Hitchcock vs. St. John, 1 Hoff. Chan. (N. Y.) 571.

Wetter vs. Schleiper, 15 How. Pr., 274.

Dana vs. Lull, 17 Vt., 390.

Rogers vs. Batchelor, 12 Pet., 230.

Wells vs. March, 30 N. Y. (Court Appeals), 350.

Palmer vs. Meyers, 43 Barb., 511.

Deming vs. Colt, 3 Sanf. (S. C. N. Y.) 284.

Hayes vs. Heyer, 3 Sanf. (S. C. N. Y.) 293.

Coope vs. Bowles, 18 Ab. Prac., 442.

Bowen vs. Clark, 1 Bissell Rep. (U. S. C. C.) 128.

Pearpoint vs. Graham, 4 Wash. (U. S. C. C.) 234.

Holland vs. Drake, 29 Ohio State, 445.

Bull vs. Harrison, 18 B. Monroe, 195.

Kirby vs. Ingersoll, Harrington Ch. (Mich.) 172.

Wilcox vs. Jackson, 7 Col., 521.

Maughlin vs. Tyler, 47 Md., 545.

Steinhart vs. Fyhrie, 5 Montana, 463.

Stein vs. La Dow, 13 Minn., 412.

Dunklin vs. Kimball, 50 Ala., 251.

Pelter vs. Orser, 6 Bosw., 123.

Loeb vs. Pearpoint, 43 Am. Rep., 123 (58 Iowa, 469).

Havens vs. Hussey, 5 Paige Ch., 31.
Ormsbee vs. Davis, 5 R. I., 442.
Wooldridge vs. Irving, 23 Fed., 676.
National Bank of Baltimore vs. Sackett, 2 Daly. (N. Y.) 400.
Loeschighk vs. Hatfield, 5 Rob. (N. Y.) 31.
Kemp vs. Carnley, 3 Duer, 1.
Haggerty vs. Granger, 15 How. Pr., 247.
Everson vs. Gehrman, 10 How. Pr., 301.
Parsons on Partnership, pp. 164–6.
Story on Partnership, Sec. 101.
Kent's Commentaries, 3 Vol., Sec. 44 and note.
Bates on Partnership, Vol. 1, Sec. 338; see cases in note.
Hughes vs. Ellison, 5 Mo., 463.
Drake vs. Rogers, 6 Mo., 318.
Clark vs. Rives, 33 Mo., 579.
Hook vs. Stone, 34 Mo., 330.
Keek vs. Fisher, 58 Mo., 532.

The authorities, as to the power of a single partner, or any less number than the whole, by virtue of the partnership relation only, to dispose of all the partnership assets, are so numerous and the facts underlying the cases so varying that we have collated for the convenience of this Court, most if not all the leading cases, noting the distinguishing features controlling the decisions in each, and, while there is some inconsistency and want of harmony in the adjudications, they are very much the same, when properly analyzed in the light of the peculiar facts of each case, and are in accord with our position.

THESE AUTHORITIES EXAMINED.

The attention of the Court is called to them in the order of their mention, and the examination of the Missouri cases is placed at the end, where they will be found to be in accord with the decisions of the other States, and not in conflict, as may be inferred, perhaps, from statements in the brief of Mr. Ess, for respondents.

One of the best considered cases is that of *Hitchcock et al. vs. St. John et al., supra*, in which this whole question is fully and ably discussed. The facts are these: One of the two partners resided in New York, carrying on the business there, and the other in Augusta, Georgia, conducting the business there, under the same firm. A suit at law was commenced by the complainants against the firm, and afterwards, within a few days, an assignment was made by the New York partner of all the partnership property of that firm, and by him executed, and *no proof was given of a ratification or assent by the partner in Augusta*. The bill in this cause was filed by a judgment creditor of said firm, after execution returned unsatisfied, for the purpose of having said assignment of partnership property set aside, and of paying the judgment out of the funds derived therefrom.

The Chancellor, in his opinion, first reviews the case of *Egbert vs. Woods* (3 Paige, 517), in which a partnership had been dissolved by the death of one of the members, the business being continued, however, by the survivor. The firm becoming insolvent, one of the survivors made an assignment of all the property, in trust, to pay certain preferred creditors. The assignment was sustained, the Chancellor observing, "that one of the partners before a dissolution, and all of them afterwards, might unquestionably exercise the right of ap-

propriating the funds to the payment of one creditor in preference to another."

Criticising and construing this case, the Chancellor, in *Hitchcock vs. St. John*, observed that a distinction is made by the Chancellor in *Egbert vs. Woods*, "between the right of one partner, upon dissolution by death, to make such an assignment against the personal representatives of the deceased partner, and as against another surviving partner. As to the former, the power existed without consent, but not as to the latter. He further states that he means not to express any opinion in favor of the validity of such an assignment by one partner *against the known wishes of his co-partner*, and in fraud of his right to participate in the distribution of the partnership funds among the creditors."

The Chancellor (in *Hitchcock vs. St. John* case), continuing, said:

"In the subsequent case of *Havens vs. Hussey* (5 Paige 30), the Chancellor laid down the positions that, although one partner might, during the existence of the firm, transfer the partnership effects directly to one or more creditors and thus give them a preference, yet he had no power to make an assignment to a trustee against the known wishes of his partner, for the benefit of favorite creditors of the assignor in fraud of the right of his co-partner to participate in the distribution of the effects, or in the decision of the question, which of the creditors should have a preference. That it was no part of the ordinary business of a co-partnership to appoint a trustee of the partnership property, and that no such authority could be implied. The power to make a sale of partnership effects resides in each partner while the relation exists. The power to bind the firm upon a purchase equally exists in each, although the goods never came into joint stock. All these instances of authority, as well as that to make negotiable paper, flow from the principle that each is the agent of the whole. But for what is he such agent? *For the purpose of carrying on the business of the firm*, and because the authority to do the act is implied from the nature of the business (Best, Jr.,

in 5 B. and A. 405.) Now, a transfer of all the effects of a firm for payment of its debts, is a virtual dissolution of the partnership. *It supercedes all the business of the firm as such.* It takes from the control of each all the property with which such business is conducted. The purposes of the business then clearly do not require that such power should be implied. What other reason is there for holding, that by the contract of partnership it is to be inferred?"

"It is no contradiction of this doctrine that where the assignment is made after insolvency, and divides the funds with perfect equality among all the creditors, it will be supported. It is clear that either party might file a bill, obtain an injunction and receiver, and insure an equal distribution of all the funds. An assignment fairly securing the same equality is an object of favor in this Court. In the absence of any indication on the part of the co-partner of a contrary intention, it may well be inferred that he consents to do justice."

This case of *Hitchcock vs. St. John, supra*, is affirmed in *Wetter vs. Schleiper et al.*, 15 How, 274, in which is large citation of authorities: *Deming vs. Colt*, 3 Sanf. S. C., 292; *Paten vs. Wright*, 15 How Pr., 488; *Kemp vs. Carnley*, 3 Duer, 6; *Dana, Adm'r, vs. Lull*, 17 Vt., 390, and authorities therein cited; and in fact, in nearly every case in which the trustee question is discussed.

Again, the Court in the *Wetter vs. Schleiper* case, *supra*, says:

"It has been frequently decided that an assignment made to a trustee of all the partnership assets for the benefit of the firm creditors, but giving preferences to some over others, is void, unless made with the assent or concurrence of all the partners, upon the ground that authority to make such an instrument is not implied by the act of co-partnership, or the co-partnership relation, and consequently cannot be inferred or presumed." Citing *Havens vs. Hussey, supra; Anderson vs. Tompkins*, 1 Brock. Rep., 456; *Harrison vs. Sterry*, 3 Cranch. Rep., 289; *Deming vs. Colt, supra; Haggerty vs. Granger*, 15 How. Pr. R., 243; *Everson vs. Gehrman*, 10 How. Pr. R., 301; *Dana vs. Lull, supra.*

In the Vermont case *(Dana vs. Lull)*, it appeared that the partners resided in different parts of the same State, and that the assignment was made by the partner *having the care and superintendence of the busines.* The Court held it void, as not being within the implied power of the partner, as agent of the firm, which only extended to acts incidental to carrying on the business of the firm, and not to the appointment of a trustee to close up the business.

So it was in the case at bar, all the partners lived in Missouri, though the business was run by those executing the instrument in controversy. It is a parallel case to the one last mentioned, and the Vermont decision is in point. In both, the whole property was conveyed to a trustee, with preferences.

Judge STORY, in *Rogers vs. Batchelor*, 12 Peters, 230, says:

"The implied authority of each partner to dispose of the partnership funds, strictly and rightfully extends only to the business and transactions of the partnership itself. Whatever acts, therefore, are done by any partner, in regard to the partnership property or contracts, beyond the scope and objects of the partnership, must, in general, in order to bind the partnership, be derived from some further authority, express or implied, conferred upon such partner, beyond that resulting from his character as partner."

In *Wells vs. March*, 30 N. Y. (Ct. App.), page 344, one of the partners had absconded, taking with him a large amount of the assets of the firm, and the assignment was made by the other partner. It was urged that, without the consent or authority of his co-partner, the assignor had no power to make even an assignment, which was not preferential. The Court, page 350, say:

"Each partner possesses an equal and joint power

and authority in behalf of the firm to dispose of the partnership property and effects for any and all purposes within the scope of the partnership, and in course of its trade and business. As agent of the firm he may sell or mortgage, pledge, apply or otherwise dispose of the firm effects for partnership purposes; may assign the firm property as a security for antecedent debts, as well as debts thereafter to be contracted on its account; and there are cases holding that his authority even extends to a transfer or pledge of all the partnership effects directly to a creditor, in payment or for the security of a debt due from the company, though the tendency and ultimate effect of such a transaction may be to destroy the partnership business." [Referring, among other cases to *Mabbett vs. White*, 2 Kernan, 442, which is the same case referred to by Mr. Ess in his brief for respondents.] "But the authority of each of several partners, as agent of the firm, is necessarily limited to transactions within the scope and object of the partnership, and in the course of its trade or affairs. A *general assignment to a trustee*, of all the funds and effects of the partnership for the benefit of creditors, is the exercise of a power without the scope of the partnership enterprise, and amounts of itself to a *suspension or dissolution of the partnership itself*. It is no part of the ordinary business of the co-partnership, but outside and subversive of it. *No such authority as that can be implied from the partnership relation*."

It is very clear, then, that in the courts of New York the case of *Mabbett vs. White*, *supra*, has not been considered as in anywise in conflict with the adjudications of that, and other States, on the trustee question.

In *Palmer vs. Myers*, 43 Barb., 511, one of the partners absconded, and it was claimed that by so doing he abandoned the business of the firm, and left the management of affairs with those remaining, and that such act vested in them full authority to do whatever was necessary to pay the debts and settle up the business of the firm.

The Court say:

"An assignment for the benefit of creditors, made

by part of the members of the firm, without the consent of the other member, where he is present, is invalid, has been well settled by repeated adjudications, and it is also settled that the *mere absence of the partner from the State, when the assignment was executed, will not make the transaction valid.*" And, further: "Even in a case where the transfer was for the purpose of paying a debt, although a majority of the court sustained the transfer by one partner, it was seriously doubted by two of the judges." [Referring to case of *Mabbett vs. White* 2 Kernan, 442.]

In *Deming vs. Colt*, 3 Sandf. S. C. R., 284, it was held that one partner could not, without the consent of the other, and without consulting him, make a general assignment to a trustee for creditors without preferences, the reason being that each partner has a great interest to see that a proper person is selected to wind up the affairs of the concern, etc.

In *Hays vs. Heyer*, 3 Sandf., 293, the case of *Deming vs. Colt* was taken as expressing the unanimous opinion of the Court.

In *Coope vs. Bowles*, 18 Ab. Prac., 442, it is held that:

"An assignment of partnership property for the benefit of creditors, made by a part only of the partners, in the absence of others, cannot be supported, unless due authority for its execution by the absent members of the firm, or its subsequent ratification, is proven."

In *Bowen vs. Clark*, 1 Bissell's Rep. (U. S. C. C.) 128, the Court, on p. 133, say:

"The authority in a single partner to dispose of the partnership property is not an inseparable legal consequence of an interest in the partnership, but is an actual agency, implied from the supposed assent of the other members; an express notice, therefore, from one member of the firm, that he will not be bound by the act of

another partner, puts a stop to the implied authority. (See 1 Am. Lead. Cases, 292 and cases cited.)"

After an examination, especially of *Anderson vs. Tompkins*, 1 Brockenbrough, 456; *Deckard vs. Case*, 5 Watts, 22; *Henry vs. Western Bank*, 6 Watts & Sergeant, 300, and other cases, all of which are relied on by respondents as authorities in their favor, the Court say:

"One member of a firm, therefore, without any express authority from the other, may discharge a partnership debt, either by payment of money or by the transfer to the creditor of any of the partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects for the purpose of selling and distributing the proceeds among the creditors in equal proportions. And no such authority can be implied."

In this case it appears that the non-concurring partner, Smith, was not absent from the country, but was at Washington, *where he might have been written to, or seen personally in four days, or telegraphed in one day*, and the Court very properly held that it was the duty of the agent of the plaintiff, and Clark (the assigning partner), to have secured Smith's assent to the assignment, as they had full notice of his objection to preferring any of the firm creditors.

So it was in the case at bar. Jas. B. Melone could have been communicated with in a few hours, and his direction as to making an assignment having been disclosed to the preferred creditors, it devolves on all concerned in the transfer to have secured his assent before executing the preferences.

In *Holland & Pettitt vs. Drake et al.*, 29 Ohio Stat., 445, WELCH, C. J., says:

"The important question in the case is, whether one member of an insolvent firm, either before or after dis-

solution of the partnership, can make a valid assignment of all its effects for the benefit of creditors against the will of a co-partner, or without procuring his assent when present or accessible."

After stating that the leading cases on the subject will be found enumerated and referred to in Parsons on Partnerships, 165, and Story on Partnership, Sec. 101 and notes, he says:

"*The weight of authority, as well as the better reasoning, is with those who deny the validity of such assignment.* The power to make it is not within the contemplation of an ordinary partnership contract. It is not a power to act as agent of the company in carrying on its business and paying its debts, but a power to appoint an agent and to clothe him with all the powers of the partners. If the power exists where there are only two partners, as in the present case, it must also be conceded where there are many. * * * We think the safer and juster rule is to require the assent of all the partners, either actually given or to be fairly implied from the situation of the parties, or from the manner of conducting the business of the firm."

In this particular case, it was held that the non-assigning partner ratified what had been done, and that his ratification here related back to the time of executing the assignment and took effect from that date, but not so as to defeat the rights of third persons acquired in good faith in the meantime.

In *Pearpoint & Lord vs. Graham*, 4 Wash. C. C. Rep., p. 234, Justice WASHINGTON, after stating the general proposition that each partner has power to dispose of the partnership property in the course of its business, says:

"But it may admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the partnership effects, otherwise than in the course of the trade in which the firm is engaged, *in such manner as to terminate the partnership. An assignment of all the effects of the concern would seem emphati-*

cally to be of this character. Such is its obvious design and such must be its necessary consequence."

In *Bull vs. Harris*, 18 B. Monroe, 195, the Court, after commenting on the general proposition that each partner has, by virtue of the partnership relation, equal and general power in behalf of the firm, to transfer, sell or dispose of the partnership effects and property for the purposes and within the scope of the partnership, and in its course of trade and business, say:

"But it has been seriously doubted whether this general power extends to a general assignment of all the property of the firm by one partner for the benefit of creditors, for the reason that such transfer would seem to terminate and dissolve the partnership."

In this particular case, the deed of trust or mortgage, preferring creditors, was made in opposition to the will of one of the partners, and that fact was known to the preferred creditors, and it was held that the mortgage was void and should be vacated, so far as it purported to convey partnership property.

The opinion of Chancellor WALWORTH, in *Havens vs. Hussey*, 5 Paige, Ch. 31, is quoted and approved.

The case of *Kirby vs. Ingersoll*, Harrington's Chancery Rep., (Mich.) 172, wherein the opinion was rendered by Chancellor FARNSWORTH, is well conceived, and very justly ranks as one of the leading cases on this subject. In this case, the assignment was made by one of the partners without the knowledge, at the time, of Kirby, the other partner, who was not consulted as to who should be the assignee, or the terms and conditions of the assignment, or anything else in connection with it, though it was alleged in the answer that the subject of assignment had been mentioned to him, and that he made no objection.

The Chancellor, on p. 184, says:

"*It will be found that the dicta relied on to sustain the powers of one partner to make such an assignment have been thrown out under special circumstances*, and that the reports, upon a careful examination, do not sustain the exercise of the power in cases like the present. The elementary writers, Gow and Collyer, state the rule to be that one partner may bind the others in all matters within the scope of the co-partnership, and the implied authority of one partner to bind another is generally limited to such acts as are, in their nature, essential to the general objects of the co-partnership. Does this rule contemplate the authority here contended for?"

The Chancellor reviews, in this connection, the case of *Harrison vs. Sterry*, 5 Cranch, 289, and says that it was manifest from the case that the assignment was made of a certain portion only of the assets to better aid in carrying on the business, and that this case was, manifestly, an exception rather than a rule and made under special circumstances. He also comments upon the case of *Eybert vs. Woods*, 3 Paige, 517, and *Havens vs. Hussey*, 5 paige, 31, and, on page 186, from such review of the cases, concludes as follows:

"It is clear that this power, if sustained at all, must be sustained upon the implied authority for that purpose from his co-partner, resulting from the nature of the contract of co-partnership. *There is no such implied power.* The authority impliedly vested by each partner in the other is for the purpose of carrying on the concern and not for the purpose of breaking it up and destroying it. *One partner does not, by any implication, confer a power upon his co-partner of divesting him of all interest in or authority over the concern. The elementary writers upon the subject do not sustain this position. The adjudged cases, when carefully examined, do not sustain it; and assuredly it is not sustained by the reason of the thing or the dictates of justice.* Every consideration of public policy or commercial convenience is against it. The result to which I have arrived is, that a partner may transfer a portion of the assets or obligations for the purpose of paying or securing debts, or to raise means to carry on the concern; but that the power here assert-

ed, of divesting entirely one partner of his interest, appointing a trustee for both, and breaking up the concern, is not one of the powers either contemplated or implied by the contract of co-partnership; and it is best that it should be so, else, who could with safety enter into such a connection? On the other hand, if partners cannot agree, and one party is violating his duty or endangering the rights of the other, the remedy is plain and adequate."

The case of *Wilcox et al. vs. Jackson*, 7 Col., 521, is well considered and as the instrument involved is called a mortgage, and it, and the facts in the case are very similar, in many respects, to those in the case at bar, we have taken full extracts from the opinion of the Court. The record discloses that both partners, Tribe & Jefferay, resided in Colorado Springs and had two stores, one there and one at Leadville; that Jefferay gave most of his attention to the former and Tribe to the Leadville house. *It was a notorious fact that the two localities are not far distant one from the other and that telegraphic and railroad communication exists between them.*

Tribe was not consulted about the transfer by mortgage to Jackson of all the goods and chattels in the Colorado Springs store, and in which the latter was authorized to take possession thereof and sell the same, according to the terms of the mortgage, and apply the proceeds in payment of his demands against the firm. Jefferay and Jackson knew that Tribe was opposed to the giving of the mortgage and had at different times refused to sign it. The suit was brought by attaching creditors to recover the possession of the stock of goods.

The Court (BECK, C. J.), on page 530, says:

"Here, then, is presented a case where a partner attempts, not only to give a preference to a single creditor, but to give it in such a manner as to divest both

partners of the possession and control of the entire partnership property, effects and business. *His acts were destructive of the partnership itself. These acts were not only done without the knowledge and consent of the co-partner, but in opposition to his wishes*, as previously made known to his co-partner and to the preferred creditor, when they asked him to join in the execution of the mortgage. Can a transfer of this nature, under such circumstances, be sustained? The power of a partner to act for and in the name of his firm, says Mr. Justice STORY, extends to all purposes within the scope and objects of the partnership, and in the course of its trade and business."

The Court quotes the following from STORY, PARSONS and KENT:

"One partner, by virtue of that relation (of partnership), is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him by virtue of that relation, all the authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged." [Story on Partnership, Sec. 101.]

Among the powers enumerated by this learned author, which may be exercised by one partner within the foregoing limits, is the power and authority in behalf of the firm to transfer, pledge, exchange or otherwise dispose of the partnership property and effects.

Mr. PARSONS says:

"The right of each partner to sell, assign, or transfer any part, or the whole of the partnership property in the way of the regular business of the partnership, is absolute and unquestioned; * * * this, however, must be done in regular course of the business of the firm, for, outside of this, he has no such power." [Parsons on Partnership, 163.]

The views of Mr. Chancellor KENT are to the same effect. [3 Kent Com. (4th Ed.) p. 41.]

The learned Judge then says:

"The substance of the rule is that, when acting in futherance of the objects and business of the firm, and

within the scope of its business, one partner is clothed with the full powers of all the partners, and is authorized to bind the firm in all transactions. This power and authority is based on the principle of agency." Citing *Bowen vs. Clark*, 1 Bissell, 128; *Wells vs. March*, 30 N. Y., 350; *Holland vs. Drake*, 29 Ohio St., 441; *Bull vs. Harris*, 18 B. Monroe, 195; *Kirby vs. Ingersol*, Harrington Ch. (Mich.), p. 172. The Court also refers to the case of *Pearpoint vs. Graham*, 4 Wash. C. C., 234, as not being in conflict with the decision, but as sustaining it.

In *Maughlin et al. vs. Tyler*, 47 Md., 545, the Court say:

"Where several parties are actual partners, *inter-sese*, and one of them, without the consent and against the wishes of the others, makes a deed of trust for the benefit of creditors, etc., *the decided weight of authority is against the power of one partner to make such a disposition of the partnership effects.*"

In *Steinhart et al. vs. Fyhrie et al.*, 5 Montana, 463, it is held:

"An assignment made by one member of a partnership firm of the property, real and personal, of the partner in favor of a creditor or creditors of the firm, without the authority of his co-partner, is void, and such property in the hands of the assignee to whom it has been assigned, cannot be considered and treated as a trust for any purpose whatever."

In this case nearly all the authorities herein mentioned are cited, including two Missouri cases: *Hughes vs. Ellison*, 5 Mo., 463, and *Hook vs. Stone*, 34 Mo., 329.

In *Stein et al. vs. La Dow*, 13 Minn., 412, it appears that the firm of La Dow & Isaacs were deeply in debt beyond its assets and some of their creditors were urging payment of their claims. La Dow was in the State of Wisconsin, temporarily absent from their place of business; his absence was unexpectedly protracted

and his return daily expected, though he did not return for three or four days after the execution of the assignment by Isaacs. BARRY, J., says:

"We find no case in which it is held that such a state of things is sufficient. We think it could not reasonably be inferred that La Dow's absence was of such a character as to show that he intended to *invest Isaacs with the extraordinary power which the latter attempted to exercise in this instance*, or to raise the presumption of a necessity so pressing as to authorize Isaacs to make this assignment without consulting his partner."

The Court further said that the non-executing partner may ratify such assignment, but such ratification cannot be permitted to relate back so as to destroy rights which have accrued, intervening the time of its original execution and the time of its subsequent ratification. [*Bradford vs. Tappan*, 11 Pick., 76; *Bagley vs. Bryant*, 24 Pick., 198.]

In this case, creditors had attached the property in the *interregnum*, and before the ratification, and the Court decided that their rights must prevail, and as against them the assignment was void.

In *Dunklin vs. Kimball*, 50 Ala., 251, it is held that when a partnership, consisting of three partners, becomes insolvent, two of the partners cannot, without the consent or ratification of the third, assign the partnership assets to a trustee for the benefit of creditors, so as to divest the right and title of the third partner. The Court say:

"Is not the authority of each partner restricted to such acts as are not inconsistent with the existence and purpose of the partnership? One partner may have contributed his personal services against the other's money for a division of the profits. *An assignment made by one without the other's consent or knowledge, would necessarily break up the business, injure his credit and be a gross violation of the spirit of their contract.*"

In this case the Court comments on the opinion of Chief Justice MARSHALL, in *Anderson vs. Tompkins*, 1 Brock. R., 456.

In *Pelter vs. Orser*, 6 BOSW., 123, HOFFMAN, J., says:

"Where a partnership consists of four members, two of whom are absent from the State on business of the firm, the other two partners cannot, without the assent of their co-partners, make a valid assignment of all the co-partnership property (in trust) for the payment of the creditors, giving preferences to some over others. The insolvency of the firm, at the time the assignment is made, will not authorize two of the partners to make such assignment. * * * It is void, because the partners have never vested each other, by virtue of the partnership union, with such a power."

In this case, that of *Mabbett vs. White*, 12 N. Y. Court of Appeals, p. 443, which is one of respondent's main authorities, is commented upon at length.

In *Loeb vs. Pierpoint*, 43 Am. Rep., 123 (58 Iowa, 469), the assignment was made by one of the partners in the firm name without the knowledge or assent of the other partner, Pierpoint, and conveyed all the property of the firm *for the benefit of its creditors pro rata*. The two partners lived in the same town, and it was shown that, as soon as Pierpoint heard of the assignment, he at once objected thereto in a written notice to his co-partner, in which he claimed that the partnership had been dissolved for more than a month prior to the execution of the assignment. The Court, after stating that the controlling question in the case was, whether one partner has power to execute a general assignment of all the partnership property for the benefit of its creditors, without the assent, expressed or implied, of his co-partner, when he may be consulted, and is capable of expressing his assent or dissent, say:

"It would appear upon principle that such power is not possessed by a partner. Under its exercise the business of the firm may be, and under almost all circumstances would be destroyed, and the partnership itself practically dissolved as to future business. *It is true that, theoretically, the assignment is for the purpose of effecting the payment of firm debts, and that the law allows one partner to use the property of the firm to discharge the indebtedness. But this rule of law is applicable to transactions occurring in the ordinary business of the firm, and does not authorize one partner, upon the exercise of his individual discretion, to terminate the business of the co-partnership.* In a matter of such great importance to each partner, both ought to be consulted and be permitted to determine whether the condition of their affairs requires them to transfer all their property and abandon their business."

The Court states that the American cases are almost unanimous in holding that no such power is possessed by one of the partners by virtue of the partnership relation. It was also contended in this case, that the fact of the assignment not being authorized by the non-concurring partner did not render it void, but only voidable, and that, as no steps were taken to set it aside, it must stand. On this point the Court say:

"But this proposition is clearly unsound. *The deed is absolutely void, for the very obvious reason that it was made without authority.* The deed can have no effect whatever, if there was a want of authority to execute it by a single partner. All instruments executed in the absence of authority are void. Want of authority in such a case strikes at the very life of the instrument. It is, in fact, not the deed of the party it purports to bind. The position, we think, demands no further attention."

In *Havens vs. Hussey*, 5 Paige, Ch. 31, Chancellor WALWORTH, in commenting on the case of *Egberts vs. Woods*, 3 Paige, 517, states that it was not necessary for the decision in that case that he should express any opinion as to the validity of the assignment of the part-

nership effects by one partner, *against the known wishes of his co-partner*, to a trustee for the benefit of favorite creditors of the assignor, etc., which was the point directly presented for the decision of the Court, and after an examination of the authorities, the Chancellor says:

"Upon the most deliberate examination of the question, I am satisfied that the decision of the Vice-Chancellor is correct; that *such an assignment is both illegal and inequitable, and cannot be sustained.* The principle upon which an assignment by one partner in payment of a partnership debt rests is, that there is an implied authority for that purpose from his co-partner, from the very nature of the contract of co-partnership; the payment of the company debts being always a part of the necessary business of the firm. And while either party acts fairly within the limits of such implied authority, his contracts are valid and binding upon his co-partner. One member of the firm, therefore, without any express authority from the other, may discharge a partnership debt, either by the payment of money or by the transfer to the creditor of any other of the co-partnership effects, although there may not be sufficient left to pay an equal amount to the other creditors of the firm. But it is no part of the ordinary business of a co-partnership to appoint a trustee of all the partnership effects for the purpose of selling and distributing the proceeds among the creditors in unequal proportions. And no such authority as that can be implied. On the contrary, such an exercise of power by one of the firm, without the consent of the other, is in most cases a virtual dissolution of the co-partnership, as it renders it impossible for the firm to continue its business."

In *Ormsbee vs. Davis & Co.*, 5 R. J., 442, the assignment was made by one partner, without the prior assent or subsequent ratification of the other, who, though accessible, was excluded from all knowledge or part in the transaction. He afterwards objected to the assignment. The Court held, that under such circumstances it was void according to the clear weight of the American cases, which were well collated and recon-

cited in Hare & Wallace's notes, 1 Am. Lead. Cases 444-447 (Ed. 1857).

In one case in same State the Court said, such an assignment was held to be an unauthorized exclusion of the non-concurring partner from the joint business, and justified the appointment of a receiver of the assigned property with an injunction to the assignee not to meddle therewith.

In the case of *National Bank of Baltimore vs. Sackett*, 2 Daleys (N. Y.) 400; the cases of *Welles vs. March*, *supra*, and *Palmer vs. Meyers*, *supra*, are both cited and approved, and it is held that:

"A general assignment of all the partnership effects to a trustee for the benefit of creditors is the exercise of a power without the scope and object of the partnership enterprise, *being a suspension and dissolution of it*, and that no such power can be implied from the partnership relation, and consequently, where it is exercised without the consent or authority of one of the partners, *the assignment is void and passes no title.*"

In this case, however, one of the partners had absconded under circumstances clearly indicating an intention to abandon the business to the remaining partners and leave them with the exclusive control and management of it, and the assignment was upheld.

In *Loeschigk vs. Hatfield*, 5 Rob. (N. Y.), on p. 31, the Court recognizes this limitation on the power of a partner by stating:

"The only restriction upon this general power" (meaning the power to apply the partnership property in the payment of the indebtedness), "is that before dissolution one partner cannot, without the consent of his co-partner, appoint a trustee for the partnership, by a general assignment of the partnership effects for the benefit of creditors and giving preferences." Citing *Havens vs. Hussey*, 5 Paige, 30; *Kemp vs. Carnley*, 3 Duer, 1.

In *Haggerty vs. Granger*, 15 How. Pr., 247, the Court cites and approves *Havens vs. Hussey, supra*; *Deming vs. Colt, supra; Hayes vs. Heyer, supra*, and *Everson vs. Gehrman* (10 How. Pr., 301), in which last case, the Court say:

"No power can be implied, unless it can be inferred that the parties intended to grant it."

The Court on 247 then say:

"Certainly the parties did not intend that one should have the power to do for them an act, which their general obligations did not recognize them to do, if the others objected to it, and its effect would be, not to continue, but to dissolve the partnership. It is because the general obligations of law require partners to pay their debts that one of them may, without the concurrence of the others, and against their will, deliver either the money or property of the firm directly to a creditor in payment of his debts, although their other creditors are postponed. *But there is no obligation of law for the firm to transfer their property to trustees, much less is there any implied authority in one to select his own trustee against the will of the others, and give him the whole control of the property.*"

In *Wooldridge vs. Irving*, 23 Fed. Rep., 676, the power was denied, though the firm was insolvent, the non-executing partner an imbecile, and the assigning partner had a power of attorney from him when sane, authorizing him generally to transact all business, but not specially providing for the emergency of an assignment. The assignment was held void on ground of want of authority, and also other grounds.

Bates in his recent work on Partnership, Vol. 1, Sec. 338, says:

"The implied power of a partner over the assets of the firm, which is so great as to enable him to convey the whole of that part of them intended for disposition, is limited to a transfer in the conducting of the business of the firm, and does not extend to a transfer which is *ipso facto* a dissolution and destructive, as distinguished

from a transfer, which, like a transfer of all assets held for sale, may lead to a dissolution, though not such *per se*.

"The difference is that the latter is in the exercise of a power to preserve, and the former is exercising a power to destroy, and it is not acting as agent, but is appointing an agent irrevocably, who supersedes the other principals. Hence it is by the weight of authority not within the implied power of one partner, or any number less than all, to assign the entire effects of the firm for the benefit of creditors, when the other partners can be consulted or are within communicable distance. It is not within the scope of the business to deprive all the co-partners of the possession and control of the partnership property." See cases cited in *notes*, all which sustain the author.

Parsons, in his work on Partnership, in speaking of a partner's authority to sell, assign or transfer the partnership property in the regular course of business, uses this guarded language:

"If, however, he undertakes not to sell the goods or property of the partnership, but to assign by way of mortgage or pledge to secure the debts of the firm, or in any unusual way, he has not necessarily any power to do this. Neither is it certain he has not. Such transactions seldom or never belong to the partnership business." [P. 164 and 165.]

Again, he says, that while a partner may unquestionably assign in good faith a part of the property to pay or secure an existing debt, or one to be contracted, the weight of authority sanctions his assigning the whole property in trust for all the creditors, especially if done without preference of any kind, although this has been questioned on the ground of its operating as a dissolution. [P. 165 and 166.]

The inclination of Justice STORY'S mind seems rather to have been against the power to assign all the property of the partnership under any circumstances. In his admirable treatise on Partnership, Sec. 101, he observes:

"It may well admit of some doubt whether this power extends to a general assignment of all the funds and effects of the partnership by one partner for the benefit of creditors; for such an assignment would seem to amount of itself to a suspension or dissolution of the partnership itself," citing in note to this passage, *Hitchcock vs. St. John, supra; Havens vs. Hussey, supra*, and other cases already mentioned.

Chancellor Kent, in his Commentaries (3 Vol. 44, note), cites the case of *Havens vs. Hussey* as settling the point that there was no implied authority in one partner, without the consent of the others, to appoint a trustee for the partnership, by a general assignment of the partnership effects for the benefit of creditors, and giving preferences.

THE MISSOURI CASES.

In this State we have several adjudications of the Supreme Court bearing on this subject, and we think entirely in harmony with those cited from other courts.

In the case of *Hughes vs. Ellison*, 5 Mo., 463, *the instrument which the Court had to construe, was a deed of trust, purporting to convey all the firm property* for the benefit of such creditors as might become parties to it, etc. The Court refers to 3 Kent Com., 44, in which Chancellor Kent says that:

"*In ordinary cases*, each party has the complete *jus disponendi* of the whole partnership interests, and can sell the effects or compound or discharge the partnership debts. This power results from the nature of the business, and is necessary for public safety and the successful operations of the partnership. He is an agent of the whole for the purpose of carrying on the business."

The Court said:

"In the cause now before this Court, Dobyns does not assume to sell the effects, or to compound or discharge the partnership debts; but he *strips not only himself but his partner of all power of doing either, by trans-*

ferring that office to another person, Hughes." Again: "The effect of Dobyn's deed here is to dissolve the partnership betwixt himself and McCune, without the consent or knowledge of McCune, and to impose on him another person in the character, either of partner or owner in common of the joint stock, before held by him and McCune."

Construing this deed of trust, the Court decided that one partner cannot make a general assignment of the partnership effects so as to bind the other, nor will such assignment avail to place the trustee in his own position as partner.

In *Drake vs. Rogers*, 6 Mo., 318, it was urged that a deed of assignment for the benefit of creditors was insufficient to pass the partnership effects, because not executed by a dormant partner.

Judge NAPTON refers to *Hughes vs. Ellison*, *supra*, in which was held that one partner could not make an assignment, and intimates that the rule should not apply to dormant partners, as the ostensible partners may sue and be sued without any notice of such dormant partner.

In *Hook vs. Stone*, 34 Mo., 329 (and to which further attention will be given in considering the execution of the instrument in controversy as a deed of general assignment), the Court say:

"Robertson could not make the assignment by virtue of his authority as partner. This is settled by previous decisions of this Court." [*Hughes vs. Ellison*, *supra*, and *Drake vs. Rogers*, *supra*.]

In this case, Robertson was in charge of the business with a power of attorney from Dyer, his co-partner (then living in California), authorizing him to manage his (Dyer's) individual business, and also to superintend their joint interest as partners, and to make such purchases as were usual to keep the stock of merchandise complete, and to renew notes in bank. The firm becoming insolvent, Robertson made the deed of assignment

to Stone, as trustee, and Hook, a creditor, levied on some of the assigned goods for the satisfaction of his debt, and the only question was as to the validity of the assignment.

This case has never been overruled in Missouri, and its doctrine goes to the extent of denying the right to the managing partner, though the firm be insolvent and the other partner living in a far distant State, and this, too, in 1862, when means of communication between Missouri and California were very different from what they now are.

In many of the other States the courts have been much more liberal in their decisions as to the exercise of this power to convey away all the partnership assets. In this State, however, the law is well settled that the concurrence of all the partners is necessary to make good such disposition of the firm property.

In *Clark vs. Rives*, 33 Mo., 579, the Court say:

"It is well settled that, in virtue of the community of rights and interest in the partnership property, each party has full power and authority to sell, pledge or otherwise dispose of the *entirety of any particular effects* belonging to the partnership, and *not merely of his own share thereof*, for any purpose within the scope of the partnership." [Citing Story on Partnership, Sec. 94.]

In the case of *Keck vs. Fisher, Admr.*, 58 Mo., 532, that of *Clark vs. Rives, supra*, is cited and approved, and reference is made to the same section of Story on Part., and also to said passage from 3 Kent Com., 44, which has been given in the Hughes-Ellison case.

Now, the Court will observe, by referring to the text in Kent, that the authorities cited in the note at bottom of page, are the same cases heretofore mentioned, and some additional, as to the power of one partner to assign all the firm property to a trustee for one or more creditors, without the consent of his co-

partners, etc.; and these authorities abundantly establish the position that a partner has no such power or authority, save, perhaps, in some cases without preferences, where a most equitable course is pursued, and, in others, where the co-partner has absconded, or is out of the country and cannot be consulted. We infer, then, that the phrase, "*in ordinary cases*," as used in these cases, means something very different from the *extraordinary* proceeding of disposing of the whole property of a failing firm to a trustee for creditors, whether for all or less number is immaterial, excepting that equity favors equality among creditors, and leans to sustain assignments without preferences; and we think it is not a violent, but rather a proper construction, considering the context and connection in which it is used in the *Keck vs. Fisher* case, p. 535, to say that the phrase, "whole partnership interests," refers to the ability of each partner to dispose of the *entirety, and not merely his own share thereof, of any particular property* belonging to the firm, and disposed of for purposes within the scope of the partnership.

In consonance with this view, Judge WAGNER, who rendered the opinion in the Keck-Fisher case, says:

"The result of the authorities is, that the act of each partner is considered the act of the whole partnership, or of all the partners, within the scope of the business of the firm."

In this case the plaintiff Keck claimed the *possession of certain personal property*, as trustee, by virtue of a deed of trust, made in the name of H. Helmreich & Co., and executed by Chas. Raber, a member of the firm. The defendant claimed it by purchase from the vendee of the firm, who bought it subsequent to the execution of the deed to plaintiff; it was contended that Raber, without special authority from the partners, had no power to make the deed. There is nothing in the

case to the effect that this certain property, over which the contest was made, was *all the property of the firm, or that it was insolvent, or that this disposition operated as a dissolution of it, or that they intended to quit business, or anything of the kind. No such questions were involved in the case nor suggested for the consideration of the Court.* It was simply a transaction in which one partner, for the express purpose of securing a firm indebtedness, mortgaged certain specific personal effects, and the other partner attempted to sell the same property to another person.

The statute then in force, in relation to fraudulent conveyances of personal property, provided that, in order to be valid as against persons, other than the parties thereto, the mortgage or deed of trust should be acknowledged and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged and recorded. [Wag. Mo. Stat., p. 281, Sec. 8.]

Section 7, of Chap. 35, on "Conveyances of Real Estate" [1 Wagn. Stat.] declares that "all deeds and other conveyances of lands, or of any estate or interest therein, shall be subscribed and sealed by the party granting the same, or his lawful agent, and shall be acknowledged or proved and certified in the manner herein prescribed."

Section 13, page 275, of the same chapter, regulates the acknowledgment in such cases, and provides that no acknowledgment shall be taken, unless the person offering to make such acknowledgment shall be personally known to the officer taking the same, to be the person whose name is suscribed to such instrument as party thereto, or shall be proved, etc. All these statutory provisions are given in the opinion of the Court.

In this case it was held, that under the statute re-

quiring mortgages of personal property to be acknowledged as conveyances of land, it was sufficient that a mortgage by a partnership be signed by one of the partners in the firm name, and acknowledged by him; this is on the theory that, technically, he is the agent of the firm and for this reason meets the statutory requirement, which is that the instrument must be signed, etc., by the party, or his lawful agent.

As the Court will readily see, this is merely, as to the *sufficiency of the execution of the instrument* (assuming that the authority to make it existed), *entitling it to record and to admit its being read in evidence*, without proof of special authority to make it.

In the case at bar, this is wholly immaterial, *for the naked question presented* is the *want of authority to make the deed at all.* If it was not good at the outset, it is very clear it cannot become so by recording it.

In the case at bar, the instrument in controversy was likewise executed by one partner in the firm name, and by referring to the provisions of the Missouri Revised Statutes (1879), applicable thereto, it will be found that Sec. 2503, Chap. 34, relating to "Fraudulent Conveyances" is identically the same as said Sec. 8, p. 281 of Wag. Stat., commented on in *Keck vs. Fisher, supra.* So, also, is Sec. 674, Chap. 20, Rev. Stat. on "Conveyances of Real Estate," the same as said Sec. 7, Chap. 35, Wag. Stat., both regulating the execution of deeds. And Sec. 680 of said Chap. 34, Rev. Stat., is the same as said Sec. 13, p. 275, Wag. Stat., both regulating the acknowledgment.

As there will be no dispute as to the above statement, relative to such statutory provisions, it is not deemed necessary to quote them in full. From all which it is apparent that the Keck-Fisher case, in so far as it gives construction to the statutes regulating the execu-

tion of deeds of trust, or instruments of like nature, by partners, has an important bearing on the case at bar.

In this connection, while examining the statues of Missouri (though somewhat in advance of the assignment question), we desire to call the Court's attention to the statutory requirements as to the execution of a "Deed of Assignment," for the purpose of showing that the

Instrument, disposing of all the partnership property of Benedict, Melone & Co., was properly executed to make it a valid deed of assignment on the part of the firm.

Section 354, Chap. 5, Rev. Stat. of Mo. (1879), provides, as to its execution, that:

"Every voluntary assignment * * * shall be proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed."

Now, said Sec. 674, Chap. 20 of Mo. Rev. Stat., provides that:

"All deeds and other conveyances of land, or of any estate or interest therein, shall be subscribed and sealed by the party granting the same, or his lawful agent, and shall be acknowledged or proved, and certified in the manner herein prescribed."

Then it necessarily follows that, as deeds of trust and deeds of assignment have both to be executed in exactly the same manner, that is, as prescribed by law, in cases wherein real estate is conveyed, *a good deed of trust would be a good assignment, and vice versa, so far as concerns the requisite statutory formalities attending the execution of either.*

It may be contended by respondent's counsel, that a deed of assignment can only be executed by all the partners joining in such execution, and, for this reason, the instrument in controversy cannot, under any circumstances, be an assignment deed.

It is not true, however, as a legal proposition that, in Missouri, or in any other State of which we are advised (unless controlled by special statute), *all the partners* have to *personally* subscribe and acknowledge a deed of assignment, in order to give it validity as a firm act. The authorities, which have been so fully cited herein, most conclusively show to the contrary.

Perhaps the last case in this State on the subject is that of *Hook vs. Stone*, 34 Mo., 329, the facts of which have been already stated. The Court very properly held thatthe power of attorney to the executing partner from his co-partner in California did not authorize the assignment of all the firm property, nor was such act authorized by virtue of the partnership relation. The opinion is brief and it will be plainly seen that it *was not contended that Robertson had any special or express authority from Dyer*, the absent partner, to make the assignment, *or that he afterwards ratified it, before or after the attachment*. The naked question passed on was whether, by virtue of the partnership relation simply, a partner is authorized to make a deed of assignment, and the Court decided he was not.

In the case of *Hughes vs. Ellison*, 5 Mo., 463, which is affirmed in the last case, the Court declares that the effect of Dobyn's deed, conveying all the firm property is to dissolve the partnership, *without the consent or knowledge of McCune*; and certainly it cannot be urged for a moment that the Court means to say that *with the consent of McCune* Dobyns was not authorized to convey the property, for such would be an unwarranted deduction from the context.

In the case at bar, there is not only consent but positive directions from J. B. Melone to make an assignment.

The principle is well established, even in States re-

quiring a seal, that one partner may bind his co-partner by deed, if he assents to it, or otherwise authorizes it to be done. In other words, the law does not require the personal signing of such partner.

"The seal of one partner to a deed, with the assent of a co-partner, will bind the firm." [*Anthony vs. Butler*, 13 Pet. U. S. S. Ct., 433 and 434; Burrill on Assignments, p. 343.]

Again: Justice SWAYNE said, in *Gibson vs. Warden*, 14 Wall., 247:

"There is proof in the record that the partners, other than Robert Moore, authorized him in advance to execute the mortgage, and, after its execution, with full knowledge, acquiesced in what he had done. If the law had required a seal, these circumstances would have made the instrument the deed of the firm, as much so as if all the members had been personally present and assented to its execution in that form." [2 Ohio St. R., 478; *Cady vs. Shephard*, 11 Pick., 405; Story on Part., p. 212, Sec. 122.]

From the foregoing authorities the complainants reach the following conclusions:

1. That a deed of assignment, as also a deed of trust, of all the personal property of a partnership can be made by one partner, provided the others direct, sanction or ratify its execution.

2. That a partner, by reason of the partnership alone, *can no more execute a deed of trust, conveying all the firm property, which operates and is a dissolution of the firm*, than he can make a deed of assignment, which produces the same result. In both cases the firm property is placed in the hands of a third person, and the non-executing partners are shut out from any and all further participation in it, or even in determining into whose hands it shall go, as trustee or assignee, as the case may be.

3. The practical effect is the same in both cases; and we apprehend the courts will not stop, under such circumstances, to make some imaginary or technical distinction between a deed of trust and a deed of assignment (as both are known in Missouri), *so as to permit the thing to be done in the one, and prohibit the same thing in the other.*

4. *The principle involved is in no wise affected or influenced by the kind of instrument used.* The *pith* of the whole current of authority on the subject, is that the act of one partner in conveying or disposing of all the firm property, and interposing a trustee between it and the partnership, is an *unauthorized act, and wholly outside of the partnership relation and business.*

5. How much better off is a partner, if his property be taken from him in the manner above stated, by means of an instrument called a deed of trust, than he would be if he is deprived of the same property by an instrument called a deed of assignment, in both of which a trustee is provided to take charge of the property? To ask the question is to suggest the answer. *In neither case is it his act, and in both it is a deprivation of his property right without his consent,* which a proper and just administration of the law does not sanction, and certainly will not uphold.

RESPONDENTS' AUTHORITIES.

We understand the respondents will rely, in part at least, in support of their position upon the following cases: *Deckard vs. Case*, 5 Watts, 22; *Tapley vs. Butterfield*, 1 Met. (Mass.) 515; *Anderson vs. Tompkins*, 1 Brock, 456; *McClelland vs. Remsdlen*, 23 How. Pr., 179; *Mabbett vs. White*, 2 Kernan, 454; *Harrison vs. Sterry*, 5 Cranch, 289; *Holt vs. Simmons*, 16 Mo. App., 114; *Keck vs. Fisher*, 58 Mo., 534.

We submit that these cases, when rightly considered in connection with their own peculiar surroundings, do not go to the extent claimed by respondents. A few brief citations will suffice to show this.

In *Deckard vs. Case*, *supra*, an assignment was made by one partner *directly to certain creditors to pay the debts of the firm after the other partner had left the country*, and was sustained on the principle of an implied power of a partner to dispose of the whole partnership effects.

In this, as in other like cases, the peculiar facts of the case were urged in support of, and controlled, the decision. The other partner had left the country, and the conveyance was made directly to the creditors to pay their debts against the firm. The question as to the effect of conveying to a trustee, was not in issue.

In *Tapley vs. Butterfield*, *supra*, SHAW, C. J., on page 18, sustains the *mortgage directly to the creditor* on the ground that,

"It is within the general scope of partnership authority for one partner to sell and dispose of all the partnership goods, in the *orderly and regular course of business*. It is, also, within the scope of partnership authority to pay the debts of the firm, and to apply the assets of the firm for that purpose. He being authorized to sell the goods to raise money to pay their debts, *he may apply the goods directly to their payment*. * * * To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation."

The trustee question is not involved, nor considered in this case. The general principles announced by the Court are by no means decisive of those presented for consideration in the case at bar.

The opinion of MARSHALL, C. J., in *Anderson vs. Tompkins*, *supra*, is much relied on by respondents, who

seem to infer that he was of opinion that the authority of the acting partner was in this respect unlimited, but there is no doubt that the fact of the partner's absence in England controlled the decision, as is shown by the remark:

"It is true Murry (the absent partner) had a right to be consulted; had he been present he ought to have been consulted. *The act ought to have been a joint act, but Murry was not present. He had left the country and could not be consulted. He had, by leaving the country, conferred everything which respected their joint business to Tompkins, who was under the necessity of acting alone.*" Again: "This power would certainly not be exercised in the presence of a partner without consulting him, and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and perhaps to fix upon it the imputation of fraud. *In this respect every case must depend upon its own circumstances.*"

In the case at bar, the facts are so essentially different, in all respects, from those controlling the decision in *Anderson vs. Tompkins*, it must, in the language of the eminent Chief Justice, "depend upon its own circumstances." James B. Melone was present in the sense of having given written directions for the making of an assignment for the benefit of all creditors equally, and even if considered as absent and his wishes not known, it was only a matter of a few hours to communicate with him, and ascertain what he wanted done.

In *Mabbett vs. White*, *supra*, the Court, on p. 454, expressly say:

"The right and power of one partner to transfer all the effects of the firm for the payment of debts, without the consent of his co-partners, has been the subject of conflicting opinions. *It is not necessary, in this case, to decide whether he can make an assignment to a trustee for that purpose.*" Citing *Havens vs. Hussey*, 5 Paige, 30; *Deming vs. Colt*, 3 Sanf., 284, and *Hayes vs. Heyer*, *id.*, 293; *Hutchinson vs. Smith*, 7 Paige, 26; *Anderson*

vs. Tompkins, 1 Brock, 456; *Harrison vs. Sterry*, 5 Cranch, 289.

In the case of *McClelland vs. Remsden*, *supra*, the Court say:

"The right of one party to make a general assignment of the co-partnership effects to a trustee, for the payments of debts, giving preferences, has *been denied by very competent and respectable authority, and probably does not exist*. But the authority of one co-partner to sell the partnership effects to a particular creditor, or creditors, in payment of their debts has been judicially determined and is settled law of N. Y.," etc. Citing *Mabbett vs. White*, *supra*.

"*There is an obvious distinction in principle beween an assignment by a debtor of his property to trustees, upon trust for the payment of particular and specific debts*, reserving the surplus to the debtor, and an assignment by a debtor of his property and effects to his creditor, upon the trust to sell and pay his own debt, reserving the surplus to the debtor, or his assigns."

The Court goes on to say the latter is, in effect, a mortgage, and

"Such a disposition of a debtors estate is therefore free from the weightiest objections against assignments upon trust to third persons for the payment of debts. There is no trustee interposed between the creditors and the property of their debtor."

The leading case, perhaps, and the one which has gone as far as any other in this country in holding that one partner may make an assignment of firm effects, without the concurrence of his co-partners, is that of *Harrison vs. Sterry*, 5 Cr., 289. This was a case where the resident and only partner in this country was Robt. Bird, and the whole commercial business of the company in United States was necessarily committed to him. There was also a firm in England. The resident partner made an assignment to a trustee for the payment of preferred creditors. Harrison claimed the attached effects as a trustee for the benefit of certain creditors of the

house of Robert Bird & Co., which was the name of the firm by which the London house of Bird, Savage & Bird carried on business at New York. The statement of the facts recites that Robert Bird, "desirous of aiding and supporting the credit of the house of Bird, Savage & Bird by raising funds, upon the security of the cargo of the East India Semiramis," etc., made the deed of trust on December 3, 1802. The instrument itself recites the existence of certain financial embarrassments on the part of the two firms, which crippled them and *rendered it necessary, in order to continue their business*, to secure all persons from whom purchases had been made or might be made, etc., for the purpose of aiding the said house of Bird, Savage & Bird.

The Court held that he had command of their funds in America, and could collect or transfer the debt due to them, and that the assignment was within the power usually exercised by a managing partner, his act being the act of all the partners.

This case is reviewed in many of the cases already cited, and especially in *Havens vs. Hussey, supra*, p. 32, in which the learned judge says it was not sustained as an assignment of all the partnership effects to a trustee for the preferred creditors, but that *it professed to be the transfer of a certain specific portion of the partnership property for the purpose of saving the credit of the firm and to raise funds to carry on the business.*

In *Holt vs. Simmons et al., supra* (Mo. Ct. Ap.) the suit was for the purpose of winding up the partnership between plaintiff and defendant, under the firm name of Simmons Refrigerator Co., which had expired by limitation several months theretofore, but no public notice had been given. After such expiration, however, the firm closed its office and removed all its remaining stock to its factory, where it was within three weeks

worked up into some ice boxes, and this was the last work done by the firm. Judge THOMPSON states that the only question in the case relates to the claim of the defendant, Judlin, upon a $400 note, which with two others to defendant Delehanty (the whole aggregating $662), had been secured by *chattel mortgage* upon all the tangible effects of the firm, which were about $1,800; the uncontested debts were about $250. The plaintiff, Holt, resisted the allowance on the ground that the note and mortgage were given without his knowledge or authority, and *after the firm's dissolution*. It is held that under the facts recited in the opinion, Simmons had power to give the note and mortgage to secure it.

The same passage from KENT (mentioned in the case of *Keck vs. Fisher, supra*), is used by Judge THOMPSON, with respect to the power of each partner over the partnership property, and in the same general sense, too, as applicable to "*ordinary cases*," wherein he has the complete *jus disponendi* of the whole partnership interests, and as the authorized agent of the firm. It concludes:

"The result of the authorities is that the act of each partner is considered as the act of the whole partnership, or all the partners, *within the scope of the business of the firm*."

In this case, the property was not conveyed to a trustee, as in the case at bar, but on the contrary, *directly to the creditor by a chattel mortgage*, and, as the firm had been already dissolved by limitation, the act of Simmons in mortgaging its effects (even if it had been to a trustee), could not operate as a dissolution under the circumstances. It was simply a question as to paying off the firm indebtedness, *after they had ceased to do business* as such, and the Court thought that Simmons, from the course of dealing shown to exist, was authorized to make the note and secure it. It will be readily

seen that this decision does not meet the requirements of the case at bar, and that the questions, now pending for the adjudication of this court, were neither considered nor decided by Judge THOMPSON.

The case of *Keck vs. Fisher*, *supra*, has been heretofore shown to be in line with the current of authority on this subject.

Respondents may contend that, inasmuch as the distinction between a deed of trust in the nature of a mortgage, and a deed of assignment, is that the former is intended as a security for a debt, to be void upon its payment, and the latter as a conveyance to a trustee for the purpose of raising funds to pay a debt, the consequences resulting to a partnership, by reason of the disposition of its whole property and business to a trustee as a security for the firm obligations, are not of the same nature as when the same property is conveyed by what is called an assignment.

We submit that such contention would be a "distinction without a difference," and *in the case at bar, it must be especially borne in mind, that the instrument itself provides that the trustee "shall take immediate possession of the property"* [print. rec., 72], *which fact conclusively determines the character of the transfer intended to be made*, and, also, that Stewart, as trustee, was to take immediate possession and hold the property *as against the members of the firm*, which he did on the evening of the execution of the deed. This fact leaves no room for a doubt that the act of R. A. Melone and C. H. Benedict, in the selection of a trustee and the conveyance to him of the partnership property, and this, too, against the will of their co-partner, was intended to be, and was, *ipso facto*, operative as a dissolution of the partnership, and thereby its property was placed in the hands of such trustee for sale and disposition. At any rate it was re-

moved from the control of the partners and *its custody vested in a trustee, not a creditor*, and this was an unauthorized act, no such power being implied in a partner.

The case at bar was not one, in which a deed of trust was made and the possession retained by the partnership until default (though such fact would not be of controlling influence by any means), but on the contrary, everything was turned over to the trustee, and the firm ceased to do business.

The authorities examined include deeds of trust and deeds of assignment, so called. As heretofore stated, the technical name of the instrument used does not affect the principle involved, and so unanimously enunciated in the reported cases.

II.

THE ASSIGNMENT QUESTION.

Does the instrument operate as a general assignment for the benefit of all the creditors? Does it in connection with, and as part of the receivership proceedings, constitute a general assignment?

We have shown that the instrument in controversy is not a good deed of trust, in the nature of a mortgage, with preferences, and that, as a deed of assignment, all the legal requisites have been met in its execution. It follows, necessarily, that it is either absolutely void, or that it operates as a general assignment or as something different in effect from a mortgage.

The second and third points in the certificate of division of opinion are as follows:

"2. As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under Section 354 of the Revised Statutes of Missouri of 1879?

"3. Does the making of that deed of trust and appointment of a receiver, who is the same person as the trustee, on the same day, and as a part of the proceeding to administer the assets of the insolvent partnership, to which the banks and Stewart and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors and require the receiver to administer the funds in his hands in that matter?" [Print. Rec. 73.]

The execution of the deed of trust, and the appointment of the trustee therein as receiver, on the same day, having been found by the trial Court, in its certificate, to be the successive steps taken by the insolvent firm of Benedict, Melone & Co. in the disposition of the whole of its assets, it will be seen that the two are so inseparably connected with each other that a consideration of the one necessarily involves the other, in order to determine the real character of the transfer the firm made of their property.

For this reason, and to avoid needless repetition as to authorities and statements of fact, we have combined the two points under one heading.

The allegation in complainants' bill is that, by reason of the matters and things therein stated, and of the statute of the State as to voluntary assignments for the benefit of creditors, the deed of trust operated as, and is, in law and equity, a voluntary deed of assignment, on the part of the firm of Benedict, Melone & Co., to Charles Stewart in trust for the benefit of all the partnership creditors. [Print. Rec. 58.]

It is in the sense of the allegation in the bill that the second point is suggested. Not that every deed of trust made by an insolvent firm is necessarily an assignment, nor that the one in controversy on its face, and disconnectedly considered from its surroundings, is necessarily an assignment. The question is whether, in

view of J. B. Melone having given his previous assent and directions to the making of an assignment, the deed of trust, made under the circumstances shown to exist in the case at bar, operates as a general assignment? Evidence, outside of the instrument, shows that it included all the partnership property, and that by it and the appointment of a receiver, who is the same person as the trustee, the firm actually disposed of all its assets for the benefit of its creditors, and thereafter ceased to do business.

MISSOURI ASSIGNMENT STATUTE.

Section 354, Rev. Statutes of Mo. of 1879, Vol. 1, page 54, is as follows:

"Every voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims, and every such assignment shall be proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed."

This section is a transcript of a similar one which first appears in the Rev. Stat. of 1865, being Sec. 1, page 452, and the Act of Feb. 13, 1864, from which it was adopted into the revision of 1865, was amendatory of Sec. 8, Rev. Stat. 1855, which is as follows:

"Every assignment hereafter made in this State under the provisions of the act to which this is amendatory, shall be for the benefit of all creditors, who shall present and prove up their claims under the provisions of said act; and all debts and liabilities so proved and allowed shall be paid *pro rata* from the assets thereof."

Section 1, Rev. Stat. 1855, Vol. 1, page 202, is as follows:

"In all cases in which any person shall make a voluntary assignment of his lands, tenements, goods, chattels, effects and credits, or any part thereof, to any per-

son in trust for his creditors, or any of them, it shall be the duty of the assignee," etc.

This section expressly recognizes the "right of a debtor to make a partial assignment, embracing only a part of his property, or a portion of his creditors." [*Shapleigh vs. Baird*, 26 Mo., 325.]

Section 39, Rev. Stat. 1855, p. 210, was approved Dec. 7, 1855, and is as follows:

"Every provision in any assignment hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void; and all debts and liabilities within the provision of the assignment shall be paid *pro rata* from the effects assigned."

After this section was added, doubts arose as to its effect on partial assignments, which were recognized by Sec. 1 as stated, and, in *Shapleigh vs. Baird*, *supra*, it was construed by Judge NAPTON, who held that it did not invalidate partial assignments for the benefit of a portion of the creditors of the assignor, but that it had the effect of overthrowing all provisions in such assignments, giving preferences among the designated creditors.

Partial assignments continued to be upheld by the courts until the law was amended in 1864, and from which said Sec. 354 (1879) has sprung.

WHAT IS A "VOLUNTARY ASSIGNMENT"?

"The term 'voluntary' is applied to assignments to distinguish them from such as are made by the compulsion of the law, as under statutes of bankruptcy and insolvency, or by order of some competent court." [*Manny vs. Logan*, 27 Mo., 528.]

Burrill, in his work on Assignments, (4th Ed.) Sec. 2, p. 3, says:

"Voluntary assignments for the benefit of creditors are transfers, without compulsion of laws, by debtors of some or all of their property, to an assignee or assignees in trust, to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor."

Again: "A voluntary assignment for the benefit of creditors implies a trust and contemplates the intervention of a trustee." [Burrill on Assignments, (4th Ed.) Sec. 3, p. 5.]

In the case at bar, by virtue of the Assignment Statute now in force, and the fact that the deed includes all the partnership effects, we are only concerned as to a voluntary assignment, which is general as to both property and creditors.

Chief Justice REDFIELD, in *Mussey vs. Noyes*, 26 Vt., on p. 473, says:

"An assignment which includes all one's attachable property, and which is intended to close up one's business, and does so at once, is clearly a general assignment." [*Noyes vs. Hitchcock*, 29 Vt., 36; *Holt vs. Bancroft*, 30 Ala., 250; *Dana vs. Lull*, 17 Vt., 390.]

In the case of *U. S. vs. Clark*, 1 Paine (C. C. Rep.) p. 629, Judge THOMPSON, in construing the Act of Congress giving a preference to the United States, and providing that its priority of lien or right shall attach where a debtor, "not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof for the benefit of his creditors," states that such preference

"Implies necessarily that the property is put out of the control of the debtor, and to be distributed by others, or by operation of law. A mere insolvency, so long as the debtor retains the management and control of his property, does not allow of the application of the law. The act looks to a legal insolvency, where the property is taken up by the law for distribution among the creditors of the debtor. * * * I know of no mode of enforcing a preference while the debtor is going on in the management of his own affairs. * * * But in this case there has been a voluntary assignment by the debtor of his property within the meaning of the law. The Supreme Court of the U. S. have decided that the assignment must be of all the debtor's property."

A voluntary assignment under this Act of Congress was considered to mean an assignment of all the debtor's

property, and so it was also held in *U. S. vs. Mott*, 1 Paine, 188.

In the note at bottom of p. 163 of Burrill on Assignments (4th Edn.) occurs the following:

"In mercantile language the term (assignment) is daily used in the same broad sense. When it is said of a merchant he has 'made an assignment,' it is understood, not that he has made a transfer of some specific article or portion of property to this or that particular creditor, in payment or as security, but that he has made *a general disposition of his property, and suspended his whole business in consequence.*"

It is the contention of complainants that it is in this same sense the word assignment is used in said Sec. 354, Rev. Stat. 1879, that is:

When a debtor has made a general disposition of all his property and effects, and suspended his whole business in consequence thereof, thereby declaring insolvency, his act in so doing constitutes a voluntary assignment under the Missouri Statute; and it is immaterial whether that act be effectuated by one or more instruments, provided they are parts of one and the same transaction, in and by which the debtor so disposes of his property. The Assignment Statute is remedial in its nature and intended to prevent preferences, as the Statute of Fraudulent Conveyances is aimed at frauds, and both must be liberally construed, in the very nature of things, in order to accomplish the purposes for which they were enacted. The Courts look beyond the mere form of instruments, and, with the aid of parol proof, construe them according to their real meaning and effect.

Martin vs. Hausman, 14 Fed. Rep., 160.

Kellogg vs. Richardson, 19 Fed. Rep., 72.

Clapp vs. Dittman, }
Perry vs. Corby, } 21 Fed. Rep., 15 and 737.

Kerbs vs. Ewing, 22 Fed. Rep., 693.

Clapp vs. Nordmeyer, 25 Fed. Rep., 71.

Freund vs. Yaegerman, 26 Fed. Rep., 812.

State ex. rel. Feldkamp vs. Morse, 27 Fed. Rep., 262.
Weil vs. Polack, 30 Fed. Rep., 813.
Crow vs. Beardsley, 68 Mo., 435.
State vs. Benoist, 37 Mo., 501.
Sexton vs. Anderson, 95 Mo., 382.
Berry vs. Cutts, 42 Maine, 445.
Downing vs. Kintzing et al., 2 Serg. & R., p. 326.
Van Vleet vs. Slawson, 47 Barb., 317.
Holt vs. Bancroft, 30 Ala., 200.
Livermore vs. McNair, 34 N. J. Eq., 478.
Watson vs. Bagaley, 12 Pa., 164.
Miners National Bank's Appeal, 57 Pa., 193.
Burrows vs. Lehndorf, 8 Iowa, 96.
Cole vs. Dealham, 13 Iowa, 551.
Van Patten vs. Burr, 52 Iowa, 518.
Heineman vs. Hart, 20 N. W. Repr. (Mich.) 792.
Harkrader et al. vs. Leiby et al., 4 Ohio St., 602.
Dickson vs. Rawson, 5 Ohio St., 224.
Englebert vs. Blanjot, 2 Whar. (Pa.) 240.
Mussey vs. Noyes, 26 Vt., 471.
Thompson vs. Heffner, 11 Bush, 359.
Perry vs. Holden, 22 Pick., 269.

EXAMINATION OF THE AUTHORITIES.

At the outset the complainants do not contend that an insolvent debtor cannot, at common law, prefer one creditor over another. The right has been recognized by the Supreme Court of Missouri in a number of cases, and it is well settled that a debtor can prefer, *so long as he does not contravene the law in such preferences.*

Neither the Supreme Court, nor the Courts of Appeals of Missouri, have ever passed upon the questions presented in the case at bar, and involving the construction of the Assignment Statute. There are two cases,

however, one in the Supreme Court and the other in the Kansas City Court of Appeals, in which a deed of trust has been distinguished, in a technical way, from a deed of assignment, and these cases will doubtless be pressed on the consideration of this Court by respondents as showing that instruments, very similar to that in controversy, have been judicially declared to be deeds of trust. We mean *Crow et. al. vs. Beardsley*, 68 Mo., 435, and *Smith & Keating Imp. Co. vs. Thurman*, 29 Mo. App., 189.

In *Smith & Keating Imp. Co. vs. Thurman*, *supra*, Judge PHILIPS, in rendering the opinion of the Court, says:

"The first contention of the plaintiff is, that the instrument is in law a deed of assignment. This is based upon the phraseology of the instrument itself, and the assumption that the property covered by the deed embraced all the property of the debtor. It is not essential to the disposition of this case to consider the question whether an instrument, in due form of a deed of trust or mortgage, *which conveys all the property of the grantor for the benefit of only a part of the creditors of the debtor, operates under our statute as a deed of assignment. The deed on its face does not purport to convey all the property of the grantor; and there is no evidence offered at the trial to show that it contained all the property belonging to the debtor.* On its face the instrument possesses the distinquishing qualities of a deed of trust or mortgage. * * * The distinction is, that an assignment 'is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance.'" [Citing *Crow vs. Beardsley*, 68 Mo. 438.]

Tested by these rules the instrument in question was declared a deed of trust. The very point which most concerns the case at bar, was not decided; that is, whether an instrument in due form of a deed of trust, and conveying all the grantor's property for only a part of his creditors, operates under the statute as a deed of

assignment. The deed did not purport on its face to dispose of all his property, and there was no evidence offered to show that it did, in fact, do so. In these most essential respects this decision does not meet the questions in the case at bar.

In the case of *Crow et al. vs. Beardsley, supra*, the plaintiffs brought an attachment suit against Beardsley and levied on his stock of goods, and thereupon one Kennon interpleaded, claiming the property as trustee in a certain deed of trust, executed by Beardsley to him to secure the payment of certain indebtedness therein mentioned, not including the plaintiff's. Relative to the debts and defeasance clause of the deed, the following statement is made on page 436:

"None of them being due, and provides that if the debts be paid at their maturity, the deed should be void, otherwise to remain in full force. * * * The only peculiarity about the deed was that it put the goods in the possession of a third party until default in the payment of the debts."

By the terms of the deed one Vance was to hold the possesion. On the trial of the case the Court gave two instructions to the effect, that the deed was good, unless the jury found it was made with fraudulent intent on part of Beardsley, and that the preferred creditors had knowledge of, or participated in, such fraud. From the judgment in favor of the interpleadear the plaintiffs appealed.

This Court will at once see that the main issue there was that the assignment (using this term in a general sense) of the goods was totally void, by reason of fraud in the grantor and beneficiaries. The Supreme Court reversed the case, holding that a participation in the fraudulent intent of the grantor by either the trustee, or beneficiaries, would be sufficient to avoid the deed.

The point in regard to the instrument being an as-

signment under the Missouri Statute, *was only incidentally discussed, the real question on the appeal being as to the instructions.*

There is nothing in the statement of facts, the briefs of counsel, or the opinion of the Court, to indicate how the assignment question arose in this case. It seems to be largely *obiter dicta*. The Court simply announces that the deed of trust, then under consideration, securing debts not due, and providing for sale of goods, in case of default, was a deed of trust, in the nature of a mortgage, that is, a conveyance in trust for the purpose of securing a debt, rather than a deed of assignment, which is more than a security for the payment of debts and is an absolute appropriation of the property to their payment.

The Court recognizes a distinction betwixt assignments and deeds of trust, in the statement that deeds of assignments did not include deeds of trust. This is, unquestionably, true in that both are provided for by statute as different instruments. Complainants do not contend that all deeds of trust are deeds of assignments, but such fact by no means militates against their position that a deed of trust may operate as one under some circumstances.

If the instrument, then in controversy had been an assignment he, Kennon, as trustee or assignee, would have been entitled to the possession of the stock of goods for the purposes of his trust in the absence of fraud in fact, vitiating the whole transaction, as has recently been decided in the case of *Sexton vs. Anderson*, 95 Mo., 373, which was likewise an interplea proceeding, and in which like questions arose as to the fraud of the grantors and beneficiaries, which, it was claimed, avoided the instrument securing the preferences; but in which case the Court say:

"Attaching creditors, assailing a conveyance as fraudulent, must stand on the case made by them and cannot prevail on the ground that the transfer amounted to a general assignment."

And in this very Sexton case, on page 382, it is held that the assignment question was not involved, nor necessary to a decision as to the issue of fraud, which was the only one in the case. Neither was it necessary in the Beardsley case, for it was there, likewise, a question of fraud in fact, and *the Court was not called upon to construe the Assignment Statute, nor to indicate what instruments would fall within its provisions, nor whether it was intended to apply to cases of insolvency, when all the property and assets of the failing debtor are disposed of by a deed of trust, or other instrument, than a technical deed of assignment.*

Now, if in the Beardsley case the point had been made that the deed of trust covered and disposed of all the partnership effects of Beardsley & Co., by reason of which the firm had ceased to do business, and simultaneously therewith, and as part of the same transaction, he, Beardsley, had instituted an action against his co-partner to wind-up the partnership business, thereby showing conclusively that he had intended to, and did, make an actual appropriation of all their property to the payment, first, of the preferred claims, and then, afterwards, to the payment of the other creditors; and the Supreme Court of Missouri, with these questions properly before it, had decided that the deed, made under such circumstances, operated only as a deed of trust and not as an assignment, then such adjudication would be entitled to great weight in the case at bar.

In the Beardsley case it nowhere appears that the deed conveyed and disposed of all his property. As stated by Judge PHILIPS, in *Smith & Keating Imp Co. vs. Thurman, supra, the deed on its face does not purport*

to do so, nor was any evidence offered at the trial to show that it contained all the debtor's property, nor was there any evidence whatever to show that there was no intention on his part to redeem or reclaim the stock of goods, and that such was understood to be the case by the beneficiaries, by reason of all which the *defeasance clause was a sham, destroying the instrument as a mortgage.*

So far, then, as concerned the Court, on the issue of fraud, made in the case, the defeasance clause in the deed had a *bona fide* and real meaning and, on its face, the deed did not appear to be, and was not an actual appropiation of the property to the payment of the indebtedness preferred by it.

This case with others has been, time and again, cited and argued before the United States Courts of this State, and it has not been understood as deciding anything further than drawing the technical distinction between deeds of trust and assignments, and holding that the latter did not include the former; and *that is all that can be legitimately claimed as having been decided in the case.*

In the absence of an interpretation of the Assignment Statute by the Supreme Court of Mo., a course of decisions has been made by the U. S. Circuit Courts of Mo., beginning with case of *Martin vs. Hausman*, reported in 14 Fed. Rep., 160. In this case there was no express condition that the deed was to be void upon the payment of the debts secured thereby. The immediate possession of the property was given the trustee.

Judge KREKEL, who rendered the opinion of the Court, refers, especially, to *State vs. Benoist*, 37 Mo., 50, and *Crow vs. Beardsley*, 68 Mo., 438, and gives a careful review of the legislation of this State as to assignments. He says, on p. 166:

"Looking at the character of the instrument under

consideration, and applying to it the distinctions made, in instruments of that class, by the authorities, it would seem that it must be declared an assignment within the laws of Missouri. The seeming incongruity of allowing preferences, and expounding instruments, making them so as to defeat their object, is the result of legislation. At common law, as already stated, a debtor could prefer one or more creditors, in whole or in part. The Legislature of Missouri, in the Act of 1855, limited that right, and, according to the construction given to that act by the Supreme Court of the State, provided that among those preferred there should be no difference. When the inconsistency of thus discriminating between the creditors was pointed out by Judge NAPTON in 1858, the law was amended in 1864 by a new section, providing that every assignment in trust for creditors shall be for the benefit of all the creditors of the assignor. Was this intended to prohibit a failing debtor from giving preferences at all. I am inclined to think so, but distinguish between a debtor who, though insolvent, yet hopes to tide over his financial difficulties by securing some of his creditors while others go unsecured. The instruments by which debts are thus secured do not fall within the provisions of the Assignment Law, while *such as dispose of the whole of the business and property of the assignor, thereby declaring insolvency, are held to fall within its provisions.* A careful examination of the long line of Missouri decisions, has led to the conclusion arrived at. This conclusion is also in keeping with the authorities of many of the States, and especially in line with Federal legislation and the decisions of its courts thereon. To reiterate: A debtor in Missouri, under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them, but he cannot do it by an instrument conveying the whole of his property to pay one or more of his creditors. Instruments of the latter class will be construed as falling within the Assignment Laws and as for the benefit of all the creditors, whether named in the instrument or not."

Circuit Judge MCCRARY concurs in the decision.

In *Kellogg vs. Richardson*, 19 Fed. Rep., 72, Judge KREKEL says:

"Under the laws of Missouri a debtor has a right to

select among his creditors, if he cannot pay all of them, whom he will pay or secure, in other words, whom he will prefer, *but he cannot make such a preference in an instrument or instruments by which he disposes of the whole of his property at one and the same time.* Such instruments fall with the provisions of the Assignment Law of Missouri. * * * Under this provision of law a merchant may give a mortgage, or deed of trust, on part or all of his property, to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his property to one or more creditors, and stop doing business. Such turning over and virtually declaring insolvency brings *the instrument, or act, by which it is done* within the Assignment Law of Missouri, which requires a distribution of the property of the failing debtor for the benefit of all the creditors, in proportion to their respective claims. Such is the declared policy of the law; it places all creditors upon an equal footing."

The two cases of *Clapp et al. vs. Dittman et al.*, and *Perry et al. vs. Corby et al.*, are reported together in 21 Fed. Rep. 15. Both were submitted on demurrer to the bill and involve the same questions. The bills allege an assignment by an insolvent debtor of all the assets to a single creditor, with the purpose of giving such creditor a preference over other creditors.

In the first case a *chattel mortgage was given*, which, it was alleged, operated as an assignment. The complainants seek to have the conveyances declared assignments under the statute.

Judge BREWER, who delivered the opinion, says:

"The first question raised is this: Where a debtor, who is insolvent, transfers all his property to a single party, and under such circumstances that it is obvious that there was *no intention of merely giving security, and with the idea of paying a debt and reclaiming property*, must such transfer—no matter by what form of instrument, whether that of a chattel mortgage or otherwise, and whether made to a creditor directly or to a trustee—

be treated as a general assignment, and for the benefit of all the creditors? This question was fully considered in the case of *Martin vs. Hausman*, 14 Fed. Rep., 160, and, after a full examination of the Statutes of the State of Missouri and the decisions of its Supreme Court, it was answered in the affirmative.

"The opinion in that case was written by Judge KREKEL, and was concurred in by Judge MCCRARY. It was followed in *Dahlman vs. Jacobs*, 15 Fed. Rep., 863, and in *Kellogg vs. Richardson*, 19 Fed. Rep., 72, and also in other cases in this court, as well as some of the District Courts of this State. While if this was a new question, I confess my own conclusions would be different, and in harmony with the decisions of *Nat. Bank vs. Sprague*, 20 N. J. Eq., 28; *Farwell vs. Howard*, 26 Iowa, 381; *Doremus vs. O'Harra*, 1 Ohio St., 45; *Atkinson vs. Tolminson*, *Id.*, 241, and other cases cited by counsel for defendants; yet I think there has been such a course of decision in this circuit as to establish the rule in the United States Courts for this State, in accordance with the opinion in *Martin vs. Hausman*, *supra*, and until there be some authoritative construction of the statute by the Supreme Court of the United States, or of the State, I shall follow the rule laid down as above. I feel the more constrained to do this, as such a construction, securing an equal distribution of the property of an insolvent among all his creditors, is manifestly most just and equitable."

In the case of *Perry et al. vs. Corby et al.*, 21 Fed. Rep., 737, a motion was made to set aside the order overruling the demurrer to the bill, and Judge BREWER, in denying the motion, says:

"This case was argued before Justice MILLER and the entire bench, and I am authorized by Mr. Justice MILLER to say that he agrees with Judge MCCRARY, and holds that such a transfer, although there is technically no assignee, *so long as it is made of the entire property of the insolvent, and is not a mere giving of security by way of mortgage*, contemplating payment by the mortgagor in the future, and the retention of possession by him, comes within the scope of the statute, and is to be treated as an assignment, and inures to the benefit of all the creditors."

The case of *Kerbs vs. Ewing*, 22 Fed. Rep., 693, was decided by Judge McCrary in 1884, who says:

"This case is not different in principle from the case of *Martin vs. Hausman*, 14 Fed. Rep., 160. It is true that in the case of *Martin vs. Hausman* the technical deed of trust, which was construed to be an assignment for the benefit of creditors, was defective as a deed of trust in having no defeasance clause attached thereto. In this case the instrument is a deed of trust in proper form. This, however, can make no difference. No matter what the form of the instrument where a debtor being insolvent conveys all his property to a third party to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors; the preference being in contravention of the Assignment Law of this State."

Judge Krekel concurs.

In *Clapp vs. Nordmeyer*, 25 Fed. Rep., 71, it is held that:

"Where a firm, who knew they were insolvent, with a view of making a total disposition of their assets, and applying them to the payment of certain creditors to the exclusion of others, and in pursuance of a scheme entered into between them and the creditors they desired to prefer, confessed judgment in favor of such creditors and had judgment entered against them for the amounts due, and execution issued and levied on all of their assets, and thereafter, but on the same day, made a general assignment, subject to said judgments and executions, of all their property, and the firm's assets were sold under said executions, and all of the proceeds paid by the sheriff into the hands of A, the attorney of the judgment creditors; held, that said confessions of judgment, and said general assignment, are to be regarded as parts of one instrument, and as together making one voluntary assignment for the benefit of creditors within the meaning of the Rev. St. Mo., Sec. 354, and that A holds the proceeds of said sale for the benefit of all the creditors of said firm."

In this case, the proceeding was a creditor's bill. Judge Brewer, who delivered the opinion, thought that

the principle in the cases of *Clapp vs. Dittman*, *supra*, and *Perry vs. Corby*, *supra*, was applicable, and suggested that in the Western District of this State a case had been decided involving this question, which had been taken to the Supreme Court for its ruling, meaning, as we understand, the case at bar. He further says:

"The principle laid down in the cases referred to was that where *a debtor, being insolvent, by any instrument disposed of all his property, such instrument must be treated as tantamount to a voluntary assignment* for the benefit of his creditors, and all share alike in the proceeds of the property conveyed,"

In the case of *Freund vs. Yaegerman*, 26 Fed. Rep., 812, it appeared that Yaegerman, having a business establishment, executed a mortgage for an antecedent debt to one Betsy Holts, which debt had existed for two or three years. Afterwards, a general assignment was made, and the assignee took possession of the property, which was sold and he held the proceeds. The question at issue was whether the mortgage should first be paid, or the funds in the assignee's hands be distributed ratably to all the creditors under the Assignment Act. Judge TREAT says:

"Taking the two papers together instead of separating them, which might be done, the mortgage and the assignment, simultaneous, should be treated as a general assignment for the benefit, *pro rata*, of the creditors."

The mortgage was declared void and the mortgagee left to share as a general creditor.

It seems that the decree in this case was withheld at the request of the parties for further consideration, and amongst the authorities presented to the Court were all the Missouri cases, and also a recent case by the Court of Appeals at Kansas City, meaning, as we understand, the case of *Sampson vs. Shaw*, 19 Mo. App., 274.

Judge TREAT held, however, that none of the cases reach the point there involved, and, after stating the

course of decisions in the United States Circuit Court for the Eastern and Western Districts of Missouri from the case of *Martin vs. Hausman, supra*, down to the present, he says:

"The matter rested in that condition until Mr. Justice MILLER came on the circuit, and it was then considered in its entirety (under the views expressed by Brother BREWER), whether he would not overrule those decisions of Judges KREKEL and MCCRARY. At Justice MILLER'S instance, I sat with him in the hearing. The conclusion reached was substantially this: That under the statute of the State of Missouri concerning voluntary assignments, when property was disposed of in entirety or substantially *—that is, the entire property of the debtor, he being insolvent—it fell within the provisions of the Assignment Law.* The very purpose of the law was that no preference should be given. No matter by what name the end is sought to be effected, it is in violation of that statute. You may call it a mortgage, or you make a confession of judgment, or use any other contrivance, by whatever name known, if the purpose is to dispose of an insolvent debtor's estate, whereby a preference is to be effected, it is in violation of the statute. That was the opinion of Brother MILLER, with which I fully concurred."

In the case of *State ex rel. Feldkamp vs. Morse et al.*, 27 Fed Rep., 262, the suit was upon an indeminty bond, given to the U. S. Marshal to indemnify him and Feldkamp against all damages and costs, which might accrue by reason of the seizure of certain property, claimed by him, to satisfy an execution in favor of Morse and against Frank & Son. It seems that Feldkamp and another creditor secured their demands, receiving the main portion of the goods, and all the other creditors were left to get what they could out of an assignment, which was afterwards made.

Judge TREAT states that inquiries in regard to this assignment matter had frequently been before his Court, during the two previous years, and they had been wait-

ing for the State Supreme Court to interpret the State statute. He says:

"This Court has held and will continue to hold, until the statute is interpreted otherwise, that where parties come, just on the eve of a collapse, and take the estate, knowing that an assignment is about to be made, they cannot hold against other creditors, because the law as interpreted by this Court is that they shall all share alike. A man in the ordinary course of business, has a right to turn out goods for the payment of his debts; but *when the final collapse is impending, and he knows it, a transfer of the entire estate to one creditor cannot be upheld*, and the latter can only take his share of the estate under the subsequent assignment."

In the case of *Weil et al. vs. Pollock et al.*, 30 Fed. Rep., 813, which was decided May 5, 1887, the opinion was rendered by Judge THAYER, who had been recently elevated from the position of Circuit Judge in St. Louis to that of United States District Judge. It appears from the averments of the bill that the defendant Pollack was insolvent, being indebted to a large amount, and executed eight confessions of judgment in favor of certain of his creditors and upon which judgments executions were issued and his entire stock in trade, fixtures, etc., were levied upon.

The plaintiffs filed their bill, in which they ask to have the confessions of judgment decreed to be for the benefit of all the creditors of Pollack, in proportion to their respective claims.

In sustaining the demurrer to the bill the Court approves the cases of *Martin vs. Hausman, supra: Clapp vs. Dittman, supra; Clapp vs. Nordmeyer, supra; Freund vs. Yaegerman, supra; State vs. Morse, supra.*

Judge THAYER, in commenting on the case of *Martin vs. Hausman, supra*, says:

"In point of fact it was an absolute appropriation of all the debtor's property for the benefit of two creditors;

and that, being an instrument of such character, it was clearly distinguishable from a mortgage, and should be classed as an assignment. That decision, however, in express language recognized the right of a debtor in Missouri, though insolvent, to prefer a creditor. The only limitation imposed upon the exercise of the right was that he could not give a preference '*by an instrument conveying the whole of his property to pay one or more of his creditors*' *to the exclusion of others.*"

He further says:

"The next case of importance was that of *Clapp vs. Dittman*, 21 Fed. Rep., 15, 737, in which it appeared that the debtor, when insolvent, by a single conveyance had made an absolute appropriation of all of his property to the payment of a single creditor.

"The case was clearly within the principle of *Martin vs. Hausman*, as the Court found that the instrument *was not intended* as a security for debt, and the conveyance was accordingly decreed to be an assignment.

"Following that case came the case of *Clapp vs. Nordmeyer*, 25 Fed. Rep., 71, in which the Court reached the conclusion that the confession of judgment and the assignment were merely successive steps in the same transaction, and that both steps were taken to accomplish but one purpose, that is to say, an assignment of all the debtor's property with a preference in favor of one creditor. The idea which underlies this decision is, that *the debtor knowingly sought to evade one of the provisions of the Voluntary Assignment Act*, while making use of that act to distribute his property among his creditors. It was accordingly held that all the debtor's property must be ratably distributed among his creditors disregarding the lien of the confessed judgment.

"The decisions in question establish the rule in the federal courts that if a debtor, on the eve of a business collapse, makes a conveyance of the whole, or of the bulk, of his property for the benefit of one or more creditors, to the exclusion of others, *such instrument will be held to be an assignment, no matter what the debtor or his creditor may see fit to call it.*"

In this case Judge THAYER, in construing the two statutes, that is, one relating to judgments by confession and the other to voluntary assignments, thought it was

the duty of the Court to reconcile the two, so that both might stand and be operative, though he concedes:

"That an insolvent debtor, who intends to and does in fact avail himself of the statute concerning assignments for the purpose of distributing his property among creditors, *will not be permitted to evade its just provisions against preferences* by a confession of judgment executed, practically, at the same moment an assignment is executed, and for no other purpose than to defeat the policy of the Assignment Act."

But adds, that in the case then under consideration, no such attempt was made on the part of the debtor, Pollack.

If the foregoing adjudications of the United States Circuit Courts of Missouri have properly construed the State Assignment Law, then it is plain that the questions, propounded in the 2d and 3d divisions of the certificate of division of opinion, should be answered in the affirmative.

The deed of trust, by reason of the circumstances attending its execution, and its disposition of the whole property and business of the insolvent firm to Stewart in trust, to be sold by him, and the proceeds thereof first applied to the payment of the preferred creditors, constitutes a voluntary assignment.

The making of said deed of trust and the appointment of the trustee therein as receiver of the insolvent partnership on the same day, and as part of the proceedings to administer their property, as stated in the 3d division, taken together, constituted the *act* of transfer of the whole property of the firm, and this was an assignment in the enlarged sense of a general transfer; in other words, a voluntary assignment under the statute.

These decisions of the Federal Courts do not stand alone in their construction of assignment statutes; on the contrary, they can be re-enforced by a long line of

adjudications from the Supreme Courts of States having such statutes, which, though varying in important respects, have mostly sought, in greater or less degree, to prevent preferences. The decided tendency of the decisions in the Courts of the different States, as to their Assignment Laws, has been such as to sustain complainants in the following contentions:

1. When a debtor has determined upon a distribution of his estate among his creditors, and, with that end in view, has first transferred portions thereof to particular creditors by way of preference, and then the residue of his property to his creditors generally, though the instruments effecting such distribution may not bear the same date, yet if they are all executed in pursuance of "an original design contemplated and determined upon in the beginning," they will be construed as one transaction, and the preferences be avoided, except in those States permitting them in an assignment.

2. The Assignment Statutes are construed liberally as remedial, and not as penal statutes, aiming at all times to get at their intent, and to prevent their violation, directly or indirectly, and also their evasion by any artifice or contrivance whatever.

3. There is no principle of law which forbids an assignment to be made of more than one instrument, provided they all constitute one transaction as above stated, and the form of such instrument, or instruments, comprising such assignment, is not necessarily decisive of the true legal character of the transfer of the property effectuated thereby. It is largely a question of fact as to what was intended to be done, and when this is ascertained, the law fixes the nature of the transfer.

In the case of *Berry vs. Cutts*, 42 Maine, 445, the Assignment Act construed provided that "all asignments made by debtors in that State, for the benefit of their creditors, shall provide for an equal distribution of all their estate, real and personal, among such of their credi-

tors as after notice become parties to said assignment, in proportion to the amount of their respective claims," etc. The Court, in its opinion, said.

"When a debtor, in contemplation of an assignment under this act, shall determine upon a distribution of his estate among his creditors, and, in execution of *such contemplated assignment and determination*, and for the purpose of giving a preference to one class of creditors over another, shall transfer to such preferred class distinct portions of his estate, and then assign the residue thereof to his general creditors, though the different instruments may not bear the same date, or be executed at the same point of time, *if they are executed in pursuance of an original design, contemplated and determined upon in the beginning, they will be deemed in law one transaction*," etc.

The Court held the transfers and assignments as parts of one transaction, and, inasmuch as the assignment did not provide for the equal distribution of the debtor's property, in accordance with the statute, it was fraudulent and void, and the assignee chargeable as trustee of the debtor.

In *Downing vs. Kintzing et al.*, 2 Serg. and R., p. 326, the Court say:

"If a man, clearly insolvent, having ceased to do business, with a view of assigning the whole of his estate for the benefit of his creditors, make first an assignment of part to one creditor, or set of creditors, and, afterwards, an assignment of the residue to another creditor, or set of creditors, the two assignments are to be considered as *one transaction*, so far as regards the right of preference of the U. S., who may resort to either fund for the payment of custom house bonds."

And again, on page 336:

"It need not be an assignment of the whole property to one set of trustees, for the benefit of creditors. An assignment of all to one creditor, to pay his own debt, or an assignment of the whole to a variety of creditors, would be within the act, for one shall not accomplish an object by *indirect means or artifice, which the law prohibits to be done directly. The law cannot be evaded by contrivance*."

In *Van Vleet vs. Slawson*, 47 Barb., 317, the facts were these: O conveyed to V his real estate by an absolute deed, and his personal property by a bill of sale. At the same time V executed an agreement, by which he convenated with O to take the property and pay certain debts of O, first, and other debts, in proportion to the amount of funds, realized from the sale of the property, and remaining after paying the preferred debts. The Court held that the deed, bill of sale, and agreement must be read and construed together, as if the whole were contained in one instrument, and that, read and construed in that manner, they constituted an assignment in trust, for the benefit of creditors, and must be so regarded in law, notwithstanding the form of words used in the second instrument. The form of the instruments does not necessarily determine their true legal character. This transaction has every element of a trust for the benefit of creditors, and, in law, must be regarded simply as an assignment of that character, notwithstanding the form of words used in the several instruments.

In *Holt vs. Bancroft*, 30 Ala., 200, the Court say:

"It is a well established doctrine of the law, that two instruments of writing may so refer to, and be connected with each other, that they will be construed as one instrument, and such a construction will be placed upon them together, as their provisions would require, if embraced in one instrument." [*Sewall vs. Henry*, 9 Ala., 30; *Love vs. Jones*, 4 Watts, 465; *Bates vs. Coe*, 10 Con., 280.] "A general assignment may be made up of two deeds, or of a succession of several distinct deeds. The question in this case is, what effect does the law assign to the two deeds, and, according to what principle is their effect to be ascertained and measured? All that we assert is,, that the first deed is but a part of a general assignment, completed by the execution of a second deed, as the first day's travel, although followed by some delay, is but a part of a continued journey."

"The law regards the two deeds as together composing a general assignment, but it *will not permit that to be done indirectly which cannot be done directly. That which violates the policy of a statute is as much condemned as if it violated the letter. The law no more tolerates an evasion of a statute by artifice than a palpable violation of it.*" [*Bruce vs. Lee*, 4 Johns. 410; *Sharp vs. Tiese*, 4 Halsted, 352, and *Gulick vs. Bailey*, 5 Halsted, 87.] "Neither an evasion, nor a direct violation of the statute, prohibiting preferences in general assignment, can render absolutely void the deed, or deeds, by which the preference is attempted to be given, because the statute itself prescribes the effect of its violation. The assignment 'shall be and enure to the benefit of all the creditors of the grantor equally.' Visiting therefore the act of evading the statute with the consequence of a direct violation, we can only annul the preference, and place the beneficiary of the first deed on a footing with the other creditors."

"The object of the statute was to prohibit all discrimination by a debtor, making a general assignment, in favor of any one of his creditors. *It is not the preference of itself, but the preference as a feature of a general assignment, which the statute condemns.* This construction of the statute is the only one which can be adopted, without extending its meaning beyond the natural import of the language, and is supported by the decisions in other States, in reference to similar laws." [Blakeley's Appeal, 7 Penn. St. Rep. (Barr), 449; *Mer. Man. Co. vs. Smith*, 8 New. Hamp., 347; *Low vs. Wymen*, *ib.*, 536; *Danforth vs. Dewey*, 5 Foster, 164; *Tillon vs. Britton*, 4 Hal., 120.]

"A deed, by which a debtor conveys to a trustee, for the benefit of certain specified creditors, substantially all the property, which he holds subject to legal process in this State, is a general assignment [Code, Sec. 1556], and enures to the benefit of all his creditors equally." [*Longmire vs. Goode*, 38 Ala., 577, which cites and approves *Holt vs. Bancroft*, *supra*; *Warren vs. Lee*, 32 Ala., 440; *Price vs. Mazaner*, 31 Ala., 701.]

The case of *Livermore vs. McNair*, 34 N. J. Eq., 478, is one of the strongest cases we have examined, as showing how far the courts have gone in giving practical

effect to their State assignment laws. In this case the defendant first executed a mortgage on real estate, then confessed a judgment on which his personal property was bid in, and then his wife bought it and gave a chattel mortgage on it.

The New Jersey Statute, as appears in *Garretson vs. Brown*, 2 Dutcher, 434, is as follows:

"Every conveyance or assignment made by a debtor or debtors for his, her or their estates, real or personal, or both, in trust to the assignee or assignees for the creditors of such debtor or debtors, shall be made for their equal benefit, in proportion to their several demands to the net amount that shall come to the hands of said assignee or assignees for distribution; and all preferences of one creditor over the other, or whereby any one or more shall be first paid, or have a greater proportion in respect of his, her or their claim than another, shall be deemed fraudulent and void, except mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors."

Like the Missouri Statute it speaks of a conveyance in trust, and it was contended that the real estate mortgage, the judgment and chattel mortgage, could not be construed to be an assignment, because no trustee was named. The Court say:

"The affair this statute was intended to regulate is marked by two distinctive features—the transfer must embrace substantially the debtor's whole estate, and a trust for his creditors must be created." [*Tillon vs. Britton*, 4 Hall, 120; *Fairchild vs. Hunt*, 1 McCart., 367.] "Both these features appear in the transaction under consideration. They appear here much more distinctly than they did in the transaction brought under review in *Owen vs. Arvis*, 2 Dutch., 22. There, no trust in favor of creditors appeared at all on the face of the papers, but it was insisted, in defending the transaction, that, though no trust appeared, the real object of the conveyance by the father to his son, was to raise the means by which the father might pay his creditors. Chief Justice GREEN, in speaking of this feature of the case, says though the papers were not in form a conveyance by a debtor to an assignee, in trust for his credit-

ors, and, therefore, not within the terms of the act, yet they were so in substance, and therefore they contravened the policy of the statute regulating assignments, and were within the spirit of its prohibition against preferences. The fact that the assignment was effected by means of a mortgage and a judgment will not legalize it, if it was made *for a purpose which contravenes the statute. The law will not permit a thing to be done by indirect means which it is not lawful to do by direct means.*"

"Chancellor GREEN stated in *Fairchild vs. Hunt*, 1 McCart., 373, that in his opinion it would be very difficult to maintain the validity of a mortgage which was executed to subserve the purposes of an assignment, in which preferences, contrary to the policy of the statute, were attempted to be created.

"Equity cares very little about mere matters of form; it endeavors to deal with the substance of affairs, and to regulate its judgment according to the real purposes which have controlled parties in the various matters brought before it for relief or correction. Now, I think it cannot be doubted for one moment that, if these parties had adopted the simplest course of procedure for the accomplishment of their purpose in the matter, its illegality would at once have been made so conspicuous that no attempt would have been made to carry it into effect."

In this case the Chancellor qualifies the right of a debtor in insolvent circumstances to give a preference to one or more of his creditors, in the statement:

"That a debtor possesses this right cannot be questioned; it flows necessarily from the complete dominion which the law gives every man over his own property. But it issubject to important limitations; it must always be exercised for honest ends and according to legal methods."

Again, on p. 483, he says:

"A creditor has a right to have his debtor's property applied to the discharge of his debts by due course of law, and any disposition which the debtor may attempt to make, that has the effect to defeat this right, is a fraud against the creditors." [*Knight vs. Packer*, 1 Beas., 214; *Johnson vs. Whitwell*, 7 Pick., 71.]

The transaction assailed in the case was held to be in contravention of both the statute regulating assignments and the statute of frauds.

The case of *National Bank vs. Sprague*, 20 N. J. Eq., 530, which is one of respondents' principal authorities as to the right of preference, is cited and approved as to a question of fraud in the case, but is not otherwise commented upon, which goes to show that the learned Chancellor understood that the two cases were in harmony with each other.

In *Englebert vs. Blanjot*, 2 Whar. (Pa.) 240, the Court construed a bill of sale to a party to pay himself and three others to be an assignment. In this case, Chief Justice GIBSON dwells *upon the importance of construing a remedial statute very liberally, and shows how easily fraud can be accomplished and a good statute evaded by designing parties, by a technical and strict construction without regarding the intent of the statute.*

In *Watson vs. Bagaley*, 12 Pa., 164, the Court held that:

"A power of attorney to collect certain moneys and pay them to certain creditors in a prescribed order of preference is virtually an assignment," and that "such an assignment is within the province of the acts regulating transfers for the benefit of creditors." In the opinion, the Court said: "If, then, the letter of attorney, and the acts done pursuant to it, virtually constituted an assignment, it was decidedly within the province of the statutes, to regulate transfers for the benefit of creditors; *else those statutes might be evaded, and the pernicious power to prefer be retained, by changing the form of the instrument.*

In *Miners National Bank's Appeal*, 57 Pa., p. 193 (1868), Judge AGNEW delivered the opinion of the Court. The assignor had conveyed or assigned part of his property, to be divided amongst certain creditors

named, *pro rata*, there being other creditors, but not sufficient property to pay them. It was held that the act, prohibiting preferences in assignments, applied to the case, and that the assignment enured to the benefit of all the creditors. In this case, the Court, though conceding the debtor's power to control his affairs, while in his own hands, reasons that when he becomes embarrassed, and is compelled to part with such control, and place his property in the hands of other persons, and out of the reach of his creditors, experience teaches that restraint becomes necessary, and justice requires that he should not dictate the course his property will take, under such circumstances. The Court says:

"*The true design of the law is that when a debtor cannot go on in business, but finds he must stop, his property shall be administered for the benefit of all his creditors alike*, on the principle, equality is equity."

The language of the act plainly points to this, the assignments it applies to being those made, "on account of inability at the the time of the assignments to pay their debts," and made "to prefer one or more creditors."

"Inability to pay marks the period when business must stop, and the assignment at this time evinces the motive of the debtor to control the actions of his creditors."

In the case of *Burrows vs. Lehndorf*, 8 Iowa, p. 96, the Court construes Sec. 977, of the Iowa Code, which provides that:

"No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors of the assignor, shall be valid, unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims."

In this case, the defendants being insolvent, or in contemplation of insolvency, executed in two days, five chattel mortgages, and one deed of trust, for the pur-

pose of securing different creditors; all conveying the same property and including all that the defendants had in their store-house, each reciting it was subject to the prior ones. They were recorded within five minutes of each other.

The Court declares that:

"The transaction constitutes, in legal effect, a general assignment, and, not being made for the benefit of all the creditors alike, without any preference of one over another, is void. A debtor may secure one creditor in preference to another; but *if he undertakes to dispose of all his property to his creditors, at one and the same time*, he must do it in such a way as to place all his creditors upon an equality, giving them all his property, to be divided between them in proportion to their respective demands."

The point was made that as all the instruments, save the last, were mortgages, no trustee is named, and, therefore, the transaction could not have been intended as a general assignment; while conceding that the intervention of a trustee is implied in a general assignment, the Court says:

"*The true inquiry is*—the essential and important features are—was defendant, at the time of the transfer, insolvent, or did he contemplate insolvency? *Did he make a general transfer for the benefit of his creditors?* And if so, then was it made for the benefit of all, in proportion to the amount of their respective claims? If not, it is invalid. *The fact that he appoints a trustee* seems, perhaps, in most instances to fix conclusively the character of the transaction as a general assignment. *If, however, he shall do that which is prohibited by the law, in another manner, the rights of creditors are not changed.*" [P. 104.]

It is not contended that the fact of the debtor's appointing a trustee would have the same significance, of itself, in this State, where we have a deed of trust, in which a trustee is a proper, if not a necessary, party just as an assignee is to a deed of assignment. As both instruments, however, have a trustee, or person in trust,

between the debtor and creditor, it will be readily seen, that, if the condition of defeasance in the deed of trust, which is the distinguishing feature between them, is not a *bona fide* one, the essential element of a mortgage is gone, and the instrument is easily converted into, and construed to be, an assignment for creditors.

The case of *Burrows vs. Lehndorf*, *supra*, followed, and affirmed in *Cole vs. Dealham*, 13 Iowa, 551, in which the Court says:

"Where a debtor conveyed a portion of his property to two creditors by mortgage without their knowledge, and at the same time conveyed the remainder to a trustee by an assignment, for the benefit of his creditors, all of which was done with a view to insolvency, it was held a general assignment, in which creditors were preferred, and therefore void."

In this case the instruments were construed together as parts of one and the same transaction, *as an assignment, conveyance and disposition of the insolvent's property.*

The case of *Van Patten vs. Burr*, 52 Ia., 518, was decided in 1879, and is exceedingly clear as to the construction of Section 2115 of their code, which is the same as Sec. 977, given in *Burrows vs. Lehndorf*, *supra*.

An action in chancery was brought to set aside a general assignment for the benefit of creditors and certain chattel mortgages executed by one Burr, in order that the property covered thereby may be made subject to a claim held by plaintiffs against Burr, upon which they had brought an action by attachment.

Chief Justice BECK, in his opinion, states that the transaction contemplated in the statutory provision and termed a "general assignment," is a disposition of all the property of the insolvent for the benefit of all his creditors, and such property passed by the assignment,

whether specially mentioned in the deed or not. The manner of the disposition of the property was not prescribed by the statute.

"There is nothing in the statute, nor is there any principle of law, which forbids such an assignment to be made to more than one assignee or trustee, by more than one instrument, if they all, together, constitute in fact but one transaction. Indeed, this Court has ruled that it may be made in that manner, that several instruments, being but one transaction, may constitute an assignment. [*Burrows et al. vs. Lehndorf*, 8 Ia., 96; *Cole vs. Dealham*, 13 Id., 551.]

"The petition shows that all of Burr's property was covered by the several instruments, for the benefit of all his creditors. There was no sale of the property to the creditors for the payment of debts, but the instruments contemplate that it should be sold and the proceeds appropriated to the creditors. The priorities of the several instruments determine the disposition of the proceeds realized from the property. Under the provisions of the instruments the assignment is not 'for the benefit of all the creditors in proportion to the amount of their respective claims.'

"Now, had *such disposition been made by one instrument it would be invalid beyond dispute, because in conflict with the statute above quoted.* Can it be held valid if made by more than one? No reason can be given to support an affirmative answer.

"It will be observed the petition alleges that the several instruments were intended to constitute a general assignment for the benefit of creditors; the facts averred clearly show that the execution of the three instruments was a *contrivance to enable the insolvent to prefer certain creditors*, without making payment to them, in the assignment of all his property. This is the very thing that the statute above quoted forbids. [*Burrows et al. vs. Lehndorf, supra; Cole vs. Dealham, supra.*] We conclude that, under the allegations of the petition the several instruments constitute one transaction, an assignment for the benefit of creditors, and that it is invalid for the reason that the creditors do not under it receive the proceeds of the property in proportion to the amount of their several claims."

In this case the Chief Justice referred to the case of

Lampson et al. vs. Arnold, 19 Ia , 479, which has been relied on by respondents as sustaining the contrary doctrine, and states that it was readily distinguishable from the case before the Court. He says the opinion was

"Based upon the right of an insolvent to appropriate his property in preferring his creditors, *while he may exercise over it the jus disponendi.* The statute simply *limiting his right to prefer creditors where he makes a general assignment*;" * * * "An assignment is the transfer of property to a trustee to be converted into money, and the proceeds thus realized to be appropriated to the payment of debts. By the payment, the money or property is transferred directly to the creditor, who acquires title thereto by the transaction from the debtor himself. Thus it will be seen that payment could not be part of an assignment by which the property is conveyed in trust to an assignee or trustee."

But the Court held that, if the debtor, with the intention of disposing of all of his property for the benefit of his creditors, mortgages a part and assigns the remainder, these constitute one transaction, and the property passes to the mortgagee and assignee in trust, to be disposed of as required by law.

In the subsquent case of *Gage vs. Parry*, 28 N. W. Repr., 82 (being 69 Iowa), which is referred to by respondents as holding a contrary doctrine, the Court, on p. 825, finds that the

"Undisputed evidence is that Morris & Humphreys did not contemplate making a general assignment when they executed the other instruments, but that they determined to make an assignment when advised, after the execution of the mortgages, that the recording of those instruments would probably have the effect to cause their unsecured creditors to institute attachment suits against them. In this respect the case is similar in its facts to *Perry vs. Vezina*, 63 Iowa, 25; *Farwell vs. Jones*, 63 Iowa, 316."

This is materially different from the case at bar. R. A. Melone directed an assignment, and his co-partners thereupon sought counsel for that purpose, and,

throughout the conference at the law office of Karnes & Ess, prior to and after the making of the instrument in controversy with the preferences, the matter of an assignment, or other disposition of the firm property, was constantly kept in view. It was not an afterthought following the deed of trust.

The leading Ohio case is *Harkrader et al. vs. Leiby et al.*, 4 Ohio St., 602. The statute provides that:

"All assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with a design to prefer one or more creditors, to the exclusion of others, shall be held to enure to the benefit of all the creditors, in proportion to their respective demands."

Daniel Leiby was insolvent, and desired to give certain of his creditors a preferred lien upon nearly all his property. It was contended that a mortgage is not an assignment, within the meaning of the act, and is in no way governed or controlled by it; that a mortgage merely creates a lien on the property mortgaged, and not a conveyance of it, and that a mortgagee is in no sense a trustee for creditors, etc. The Court say:

"To bring a case within the operation of the law, there must be a transfer or conveyance of property or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it, for the benefit of some one or more of the creditors of the debtor, other than himself. *But we are clearly of opinion that an assignment by way of mortgage, may effect such transfer*, and, in such case, the mortgagee becomes a trustee for such creditor or creditors." Again on p. 610, the Court say that, in exact propriety of language, a mortgage is not an assignment, that the statute is not a penal one, but is of the most beneficial characacter, and that the courts *uniformly hold it should receive a most liberal construction;* that "it promotes justice and equity by compelling an equal distribution of the effects of an insolvent debtor, amongst those equally entitled" * * * ; that it allows the debtor to use his property for the payment or security of any of his

debts, but, as soon as he attempts to create a trust with a preference for any of his creditors, *by surrendering his property, the statute steps in and declares it a trust for all;* that when he puts his property beyond his power for such purpose, the law deprives him of all ability to direct or control its destination. The statute was passed to furnish the remedy, and "should be so construed as to make it effectual. *This can only be done by looking at its spirit and purpose, and holding cases falling within the mischief, intended to be remedied, to be within the act.*"

The Court, further discussing this statute, declares that, as the mischief it was designed to prevent was the power insolvent debtors before had of directing the application of trust funds, created by them, so as to secure preferences amongst their creditors, suggests the question:

"How can it make any difference in what manner the fund was created? A mortgage is just as effectual as an absolute deed to create such a fund, just as fully disposes of the debtor's property and secures the same inequitable preferences to the favored creditors. It could make no possible difference, either to the preferred creditors, or those unprovided for, whether the debtor's property was appropriated in the one way or the other; while the debtor's power over the distribution of the fund, by simply changing the form of the instrument, would remain wholly unimpaired. With such a construction, the statute is a perfect nullity. To give it such a construction is to suppose the Legislature absurdly attempting to suppress a mischief in one form, and leaving another, equally convenient and effectual, in which it might, with impunity, be accomplished."

The case of *Harkrader vs. Leiby*, *supra*, is cited and approved in *Dickson vs. Rawson*, 5 Ohio St., 224.

The object of the Kentucky Statute is the same as ours, the language differing, and the Court, in construing it, say, in *Thompson vs. Heffner*, 11 Bush, 359:

"If the facts are such as to show that at the time of making a mortgage, preferring one creditor, over another, the debtor must have known he was insolvent, it will be within the statute."

In *Taylor's Admr. vs. Taylor's Assignee*, 78 Ky., 470, the Court construed a check on a bank to amount to a general assignment.

In *Whitaker vs. Garnett*, 3 Bush (Ky.) 402, several mortgages and deeds, so far as they secured pre-existing debts, were held to amount to a general assignment.

In *Selz vs. Evans*, 6 Bradw. (Ill. App.) 466, a bill of sale of all a merchant's stock to one creditor, held to amount to an assignment, and void for preference, and reserving surplus to the assignor.

In *Perry vs. Holden*, 22 Pick., 269, the Massachusetts Statute is construed, which provides that no assignment shall be valid, unless so made as to give creditors, becoming parties to it, an equal share of the assigned property, and that the debtor shall not be entitled to his discharge if he has made any payment or conveyance of his property with a view to give a preference.

The debtors gave instructions at the same time for drawing the mortgage and the assignment, the same persons being trustees under the assignment and mortgagees under the mortgage. Chief Justice SHAW, in his opinion on p. 277, says:

"Instruments made at the same time between the same parties to accomplish one and the same object, shall be construed and taken together as one transaction. * * * The mortgage and assignment must be construed together as parts of one and the same transaction, and as *one arrangement, conveyance and disposition of the insolvent's property.*"

In *Mussey vs. Noyes*, 26 Vt., 471, REDFIELD, C. J., uses this expressive language:

"We think, after careful examination of the papers executed in this case and diligent comparison with the reported cases, that all the papers executed on the same day, *and to effect the same general design*, must be regarded as one transaction."

In *Heineman vs. Hart*, 20 N. W. Repr., 792, one of the questions involved was whether a certain mortgage, given to secure to one Emil Hart a preference over the other creditors of Leopold & Co., was contrary to the Statute of Michigan, forbidding the creating preferences in common law assignments. A few days after the mortgage was given, one of the partners went to Chicago for the express purpose of trying to get an extension from their creditors, in which he did not succeed. He returned and an assignment was at once made. There was some conflict of testimony as to how far the assignment had been previously contemplated, in case no extension should be granted, and also as to the pecuniary condition of the firm. A suit was brought in equity by the complainant as a receiver, who acted in lieu of the assignee, who had resigned, to set aside the chattel mortgage to Hart as fraudulent against the firm creditors. It appears from the statement of the facts in the case, that, at the time the mortgage was given, the firm was in a bad condition financially, and that Hart distrusted their financial soundness and ability to continue business. One of the firm testified that, at the time he gave the security, they contemplated an assignment, and the other that they were compelled to assign unless they obtained an extension. The Court say that these facts

"Conduced to prove that the mortgage and the assignment were part of the same scheme, and that, by taking such mortgage, the defendant knew, or must under the evidence be held to have known, that the very act of taking his chattel mortgage would force his debtors to make the assignment and secure to him a preference over other creditors of the firm. Had the mortgage been taken by the defendant as security for a firm debt, without knowledge or notice of the insolvency of the partners, and of their intent to make an assignment, it would have been valid in his hands. *But a person cannot be permitted to evade the provisions of the law forbidding preference by taking security from his creditor who is*

insolvent, while he is cognizant of his debtor's financial condition and of his contemplated assignment, although a few days may intervene before its consummation. I am forced to the conclusion from all the evidence before us that the defendant occupies the latter position, and that the degree appealed from should be affirmed, with costs."

Chief Justice COOLEY concurred.

In all these cases the courts have uniformly *ignored mere form, and grappled with the substance of affairs.* It is not deemed necessary to point out in detail the differences between the Statutes of the States mentioned and that of Missouri. Their decisions show the main features of their provisions, which are not unlike our own in many respects. The principal object they all seek is to either prohibit absolutely, or control, preferences in assignments, and which preferences have been attempted to be made by all kinds of instruments, and even court proceedings as adjuncts thereto.

The Iowa Statute only relates to general, and not to partial assignments. With us, as in Pennsylvania and Alabama, the assignment is not made void by reason of the preference, but it enures to the benefit of all the creditors, and they share alike in the proportion of their demands. The difference in these statutes may have had some influence in the result, yet, in most all of these cases, the real questions involved in this case were discussed to some extent at least. The difference is more one of fact than law, and these courts do not regard their respective decisions as in conflict. It is difficult to extract from them any one or more particular fact, upon which the more general proposition is made to turn. Each case seems to stand largely upon its own peculiar facts. They seem to agree in this, that although they may be separate instruments, different in their character,

yet, if parts of one transaction, *and made to effect the same general design*, they are to be treated as if all in one instrument; and, while recognizing the common law right of preference, they all agree that their statutes condemn it, *when it becomes a feature of a general assignment*, and this, too, whether such assignment be made up of one or more instruments.

These courts have firmly and wisely held that their statutes are remedial and cannot be violated, either directly or indirectly, and they have been, especially, severe on contrivances *intended to accomplish indirectly that which could not be done in the assignment instrument.*

The complete dominion, which the law of the land gives to every man over his own property, is subject to the two important limitations, as stated by the chancellor in the New Jersey case, that "it must always be exercised for honest ends and *according to legal methods.*"

It will be at once suggested to the Court, from their reading, that all of these State authorities apply more or less strongly to the point of law in the 3d division of the certificate, and many of them to that in the 2d division.

Unlike most of the States, the Missouri Statute does not use the words, "made in contemplation of insolvency," or "insolvent debtor." It simply says, "made by a debtor," etc. As a matter of fact, assignments are only made by insolvent debtors, or debtors in failing circumstances, and our statute is manifestly intended to apply to such. Missouri has no insolvent law, as such, so that practically, and to a certain extent, the Assignment Law is its insolvent law, as appears in the case of

State to use vs. Benoist, 37 Mo., 501, in which, on p. 510, the Court say:

"In England, an assignment which conveys the whole, or so large a part, of the debtor's property as to render any further prosecution of his business impracticable, is held to be an act of bankruptcy and void, as made in contravention of the Bankrupt Act, and the property assigned will be thrown into a course of administration under that act. In this State, we have no bankrupt law, nor any insolvent laws, properly so called, but we have an Assignment Act, and it has been uniformly held by this Court, that *every assignment of this nature comes within the purview of that act*, and that the property assigned must be disposed of, and the trust executed in pursuance of the provisions thereof."

In this case the Court observed that it was apparent the instrument, construed to be an assignment, "was made without any reference to the Assignment Act." It contained provisions *contrary to the spirit and intent of that act and in conflict therewith*. These were held void, and, adopting the words of the Court, "*the assignment carried into effect, so far as can be done in accordance with law.*"

The Missouri Statute *is broad and liberal enough to include, and is intended to cover, all kinds of assignments and not simply such as are technically made in accordance with its provisions*, for if such was the case, it would not subserve the purposes usually intended to be met in such enactments, which is not to be presumed.

As tending rather to the contrary, and as showing that the statute is *sui generis*, and only intended to prohibit preferences in the assignment instrument itself, the respondents rely on the case of *Sampson vs. Shaw*, 19 Mo. App., 274, in which it appears that on June 13, 1881, one Hanbloom, being involved, gave a *chattel mortgage* on his property to plaintiff Sampson, and the next day made an assignment of all his property to defendant Shaw for the benefit of all the assignor's creditors. The property was attached by one of Hanbloom's

creditors, and both Sampson and Shaw filed interpleas in the attachment suit, the first claiming the property by virtue of the chattel mortgage and the latter by virtue of the assignment.

Judge HALL, in rendering the opinion of the Court, cites and approves *Wakeman vs. Groves*, 4 Paige, 23, in which it is held that, *so long as an insolvent retains dominion over his property*, he may incumber and convey it as he pleases, if not contrary to law, *but, when he loses dominion over it and transfers that dominion to another, then there attaches the right of creditors to a pro rata dividend.* He says:

"We think our statute is founded upon an entirely different base from a Bankrupt Law, and that it goes no further than to forbid preferences in and by the instrument by which the debtor surrenders to his creditors all dominion over his property; and that a distinct and special transfer by a debtor, before he has surrendered such dominion, even though in contemplation of a general assignment, is valid and not within the statute."

There is a vast deal of difference between this, and the case at bar, when the facts are discriminately applied. The instrument creating the preference was a chattel mortgage, which is different in form from either a deed of trust or deed of assignment. The chattel mortgage is made *directly to the creditor*, while in the other two instruments a trustee is interposed. Though the lien of such mortgage is created, yet dominion and control of the property, at least until default, remains in the mortgagor. In the act of making the mortgage, simply, (and independently of the assignment feature) the insolvent mortgagor would not lose dominion over his property, as was done in the case at bar, by actually turning over everything, belonging to the partnership, to a trustee, and winding up the firm business. In the one case there was left dominion enough, perhaps, on which to base an assignment. In the other (the case at bar),

the *insolvent partnership had in, and by means of, the very instrument itself, creating the preferences, lost dominion over its property and transferred such dominion, with the actual possession thereof, to another, and there then attached the right of creditors to a pro rata dividend.*

We admit that, so long as an insolvent debtor retains the management and control of his affairs, there is no way of forcing him to make an assignment, but (as stated in *Harkrader vs. Leiby, supra,*) "as soon as he attempts to create a trust with a preference for any of his creditors, by surrendering his property," thereby losing dominion over it, "the statute steps in and declares it a trust for all." In such case, as said by Judge THOMPSON, in *U. S. vs. Clark, supra*, the law looks to legal insolvency, "where the property is taken up by the law for distribution among the creditors of the debtor." As to when the debtor loses such dominion, is a question of both law and fact, and cannot be arbirtarily determined in any given case. In this case *(Sampson vs. Shaw)*, Judge HALL does not say, nor intimate, what may or may not constitute an assignment under the Missouri Statute, nor by what kinds of instruments it may be effected—these questions were not before the Court.

In these respects it was like the case of *Smith & Keating Imp. Co. vs. Thurman, supra*, subsequently decided, in which Judge PHILIPS says the Court were not called upon to determine whether a deed of trust, covering the whole property, for the benefit of only a part of the creditors of the grantor, operates as an assignment, etc.

If this opinion, in the Sampson-Shaw case, means that the assignment of the debtor's property must be made by only one instrument, and no more, and that only preferences named in that particular instrument

come within the prohibition of the statute, and none other, then, indeed, has a strict construction been given to the statute, *not in harmony with that liberal one in most of the States, where it has been regarded as remedial and a construction given, accordingly, to make it effectual.* "This can only be done by looking at its spirit and purpose, and holding cases falling within the mischief, intended to be remedied, to be within the act."

Chief Justice BECK (in *Van Patten vs. Burr, supra*) very aptly suggests that if such disposition had been made by one instrument, it would unquestionably be invalid, because in conflict with the statute. He adds:

"Can it be held valid if made by more than one? No reason can be given to support an affirmative answer."

In this State deeds, absolute on their faces, have been, time and again, declared to be mortgages when they were intended merely as securities for debts [*Copeland vs. Yoakum*, 38 Mo., 349], and it has been the known course and policy of our courts to go into the *very marrow of conveyances*, that their real meaning might be ascertained; otherwise, the "mask and trappings of fraud" would never be stripped from the faces of such instruments. Is there anything in the Assignment Statute to create an exception? We think not.

The case of Sampson vs. Shaw is not in Conflict with Complainants' Contention.

In the case at bar, the preferences attempted to be made are not by a distinct and special transfer as in *Sampson vs. Shaw, but are in the deed, which alone, or in connection with the receivership matter, constitutes the assignment, which is a distinguishing feature of itself.* It is clear, then, that the point of our contention, as to the 2d division of the certificate, does not conflict with this case.

Now, can the making of the deed of trust and the appointment of the receiver, as stated in the 3d division of the certificate, be adjudged an assignment, under the doctrine of the Sampson-Shaw case. We think it can. In that case, the Court bases its opinion upon the fact that there was a *distinct and special transfer* by chattel mortgage *before the debtor had surrendered dominion over his property.*

In the case at bar, the trial Court finds, in its certificate, that the two acts of executing the deed and appointing the receiver, were done *at the same time, and as part of the same proceeding to administer the assets of the insolvent partnership.* It would appear to be axiomatic then, in such case, that, the whole including its parts, any consideration of the transfer, in its entirety, would necessarily involve its parts; and, hence, that any preference, in either of such parts, in contravention of the statute would affect the whole transaction the same as if such transaction had been effectuated by one instrument, in which the preference was named. In the case at bar, the *recording of the deed would answer the statutory requirement,* [see pages 39 to 41, this brief.] as to the recording of the deed of assignment; and, in that statutory sense, perhaps, it might be termed the assignment deed, though the *fact of the insolvent debtor's having made a voluntary assignment, under the statute, might have to be determined from the consideration of several instruments,* which read and taken together (as they must be when parts of the same transaction) show that he has conveyed all his property to a person in trust for creditors, to be sold and the proceeds thereof applied to the payment of his indebtedness. Under all the authorities such a disposition means an assignment; and as stated in the Benoist case every assignment comes within the purview of the Act.

That part of Judge HALL's opinion, in which he upholds such special transfer "even though in contemplation of a general assignment," is not involved in the case at bar, for the obvious reason that the trial Court has found, in 3d division of its certificate, that the deed of trust and receivership proceedings *were one transaction and not distinct transfers*, in the sense of being different transactions.

Recently, at the April Term of the Missouri Supreme Court, which is the highest judicial tribunal in this State, Judge BLACK rendered the opinion of the Court in *Sexton vs. Anderson*, *supra* (95 Mo., 373). In this case a firm of insolvent debtors made an instrument, in the form of a warranty deed, whereby they sold their entire stock of goods, etc., to plaintiff and one Bush for $6,850, and, at the same time, the plaintiff signed another writing, reciting the sale and binding himself and Bush to pay certain debts therein mentioned, and inclusive of their own, and to release the debtors from their payment, on the condition, however, that they realized enough net out of the property to pay the debts. The issue was one of fraud, as hereinbefore stated in connection with *Crow vs. Beardsley*, *supra*, and it was not necessary to a determination thereof to adjudge the legal effect of the instruments. Notwithstanding such facts, as the question had been raised, Judge BLACK says:

"It is suggested, *probably for the first time in this Court, that the two documents, when taken and read together, as they must be, resolve the whole transaction into a voluntary assignment. There is a vast deal to be said in favor of this proposition.* But it does not follow, from being an assignment, that the transaction is fraudulent or void. Our present law in respect of a voluntary assignment, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors in

proportion to their respective claims. The fact that the deed of assignment does not name all the creditors does not render it void. Though part only of the creditors are named, the assignment will enure to the benefit of all. [*Crow vs. Beardsley*, 68 Mo., 437.]" * * * "If an assignment, the creditors should proceed to compel the trustees to give bond and administer the property under the Assignment Law. It is suggested that they did not have any information of the agreement converting the bill of sale into an assignment until the trial of this cause," etc.

It is not difficult to read "between the lines" what the Court thought the two documents constituted. While not necessary to adjudge the transaction to be an assignment, the Court virtually so pronounced it. The two instruments, "when taken and read together, *as they must be*," *resolve the transaction, not simply one paper, into a voluntary assignment.*

The transaction here was the *act of transfer of the property*, which was accomplished by two instruments, which, in themselves, were merely the evidences of what had been done. If the preferences, prohibited by the statute, are restricted to such as appear in the one instrument by which the debtor surrenders his property, and it turns out he has done this by resorting to several instruments, as in the Sexton-Anderson case, then a condition of things is presented entirely out of harmony, and inconsistent, with the doctrine of *Sampson vs. Shaw*, as above indicated.

Burrill, in his work on Assignments (4th Ed.), see 128, says:

"A general assignment, though usually made by one deed or instrument, may be made as effectually by several instruments, relating to the same subject matter." And this position is sustained by the weight of authority.

The *oneness* of the transaction in the case at bar has been clearly enunciated in the 3d division of the certifi-

cate of division of opinion. It is the contention of complainants that

The very oneness of the transaction, or proceeding to administer the assets of the insolvent partnership, as stated in the 3d division of the certificate, necessarily implies that there was no intention of merely giving security, with the idea of the firm paying the preferred debts and reclaiming the property, but, on the contrary, the TRUE MEANING of the parties to the proceeding was, that Stewart, the trustee, SHOULD SELL THE PROPERTY, AND THEREBY RAISE A FUND WITH WHICH TO PAY, first, the bank claims, and then distribute the balance to the general creditors, and this constituted an assignment. The facts disclosed by the evidence, also, show such to have been the case.

In this connection, and as a legitimate inquiry as to the *real purpose* of the insolvent firm in the disposition of their property, it is well to review, briefly, such portions of the evidence as will answer such inquiry, in as much as respondents' counsel in their brief have made reference to parts of the evidence.

It is undisputed, so far as concerns J. B. Melone, that he wanted an assignment made for the benefit of all the firm creditors, as had been done by him in favor of the creditors of the Macon banks, the failures of which were the primal and immediate cause of the firm's trouble, and that he sent written directions to his copartners at Kansas City to that effect, and requested or suggested Stewart as assignee. [Print. Rec., 78-81.]

After reading the communication, they sought Stewart, explaining the matter to him and their attorney, Mr. Craig. The firm of Karnes & Ess being at that time attorneys for Stewart, and also for the Kansas City Savings Association, afterwards changed to Bank of Commerce, by which name it is here sued, it was suggested by Stewart and L. F. Wilson, vice-president of the bank,

that the parties go to Karnes & Ess' law office [print. rec., 94, 95], which was done, and there the papers were drawn by Mr. Ess.

The witnesses, as to the immediate facts connected with the execution of this instrument, are R. A. Melone and C. H. Benedict, on part of complainants, and L. F. Wilson, vice-president of Bank of Commerce; Charles Stewart and H. N. Ess, on part of respondents.

RICHARD A. MELONE, on direct examination, testified as follows:

Q. In what way did you understand you were disposing of the property described in that paper (meaning the deed of trust)? A. I understood that we undertook to make the Bank of Commerce, the Bank of Kansas City and the Citizens National Bank three preferred creditors; that is, as I understand it, they were to have the *first money that came in to settle their debts*, or until their debts were liquidated, and, after that, the *balance of the property* was to go to the other creditors.

Q. You understood the effect of the paper you signed to be the securing of the banks in the amount of the indebtedness to them, and a distribution of the balance of the property among the other creditors in proportion to the debts: is that a correct presentation of what you have stated? A. Yes, sir. [Print. Rec., 96.]

Q. What was your purpose in going to see Mr. Stewart on the morning of the 16th of February, 1882? A. *I went there to get him to act as assignee in the matter.*

Witness further stated that he understood it was agreed between the parties that day that Charles Stewart was to *wind up the business* as receiver, and, when he had paid off the bank claims, that he was a *trustee to hold the balance of the property*, for the other creditors, until they were paid. The purpose and object of himself and Benedict, in going to an attorney's office, was to make *an assignment* for the benefit of their creditors, and, after they had agreed to make the banks preferred creditors, the instrument was drawn up, which he, witness, understood to be an assignment; at least, he has always called it an *assignment, for the purpose of making the banks preferred creditors, and leaving the balance of the property to go to liquidating the claims of the other creditors.* He understood they did that, as that was

what they went there for. He supposed the attorneys decided among themselves as to the course to pursue, or the proper way to do it, in the preparation of the necessary papers. [Print. Rec., pp. 97–98.] The firm of Benedict, Melone & Co. never transacted any business after February 16, 1882, when Charles Stewart took charge of the business and all the property of the firm. He understood it was agreed by the attorneys that it was proper to bring a suit to settle the partnership, which was done, the purpose being to wind up and settle the business of the firm, and have Mr. Stewart to take charge of the business and pay off the indebtedness, and, if anything was left, to pay it to the partners. [Print. Rec., 99–100.]

CROSS EXAMINATION.

He further stated that he understood the paper he signed was a deed, turning over to Stewart all the assets of the firm for the purpose of securing the banks, in their claim of about $19,000, and, then, the balance of the creditors; at least, that was the intention. [Print. Rec., 106.] He supposed all the property was to be turned over to Stewart for the benefit of the creditors; that the deed of trust was for the benefit of the banks, and after they were paid first, the other creditors were to be paid likewise. [Print. Rec., 107.]

Q. Did you understand that, by the deed of trust, you provided for the creditors, other than the three banks? A. I was under the impression that the deed of trust was for the benefit of the three banks, and then the receivership was to *dispose of the balance of the money*. [Print. Rec., 107.]

Q. You know there was a deed of trust in which the banks were preferred, and that proceedings were instituted to wind up the partnership, and to appoint a receiver to equally distribute the property of the firm, after the banks had been paid in full? A. That was my understanding of the matter. [Print. Rec., 109.]

On re-examination: He stated that, by the proceedings had on February 16, 1882, they *disposed of and appropriated their entire property to the payment of their debts*, and since then have had no control or interest in it. And the instrument he signed, and the suit instituted, were done at the same time, and were parts of the same transaction, the intention being to turn over the property to the creditors, after paying the banks, which

were preferred. The reasons that influenced him to make the banks preferred, were because of the objection and refusal of Mr. Stewart to acting, either as receiver, assignee, or otherwise taking charge of the business, unless the banks were preferred. [Print. Rec., 118–119.]

CHAS. H. BENEDICT, on direct examination, testified as follows:

That he went to the office of their attorney, Mr. Craig, for the purpose of making a "*straight, square assignment,*" *and did not think of preferring anybody.* The preference was an after consideration, made after Stewart refused to act as assignee, unless the banks were preferred. [Print. Rec., 130.]

Q. You may state what your final conclusion was? A. Our final conclusion was to make these three banks preferred creditors and pay them off in full, dollar for dollar, and the balance of the assets of the business to go to the creditors *pro rata*, and, if there was anything left after they were paid, it was to go back to Benedict, Melone & Co. After the conclusion was reached, it was left to the attorneys to draw up the papers and carry it out. *He, witness, and Melone did not tell them how to do it.* [Print. Rec., 131.]

Q. Now state what was said there in reference to the mode, or method, of carrying your purpose into effect, if anything? A. Well, the idea was to make a deed of trust to secure the banks and pay them off, and then appoint a receiver. This plan was suggested by Mr. Craig or Mr. Ess. They (witness and Melone) were told by the attorneys that an assignment could not be made, *because of J. B. Melone's absence, as he would have to sign it; and they were also informed that the only mode, or process, to accomplish the end in view, was to do just as they did, in order to secure the Kansrs City banks, and distribute pro rata the balance of the money, to be derived from their property, amongst the other creditors.* [Print. Rec., 132.]

Q. Now you may state what was done as a matter of fact; what course was taken? A. There was a deed of trust executed to secure these banks, and Mr. Stewart was appointed trustee in it, and then he was appointed receiver for the balance, *to receive money and pay it out and wind up the business. Both* proceedings were deter-

mined upon at the same time, and, by these proceedings, it was intended to *wind up the business and pay off the banks, and then pay the balance to the creditors.* "*That was the intention, and nothing else in the world.*"

Q. State if both were agreed upon before either was drawn? A. I suppose they were; I *suppose we agreed upon the line of action before we went to work.* [Print. Rec., 133.]

Q. You have stated that, to effectuate your purpose, you made a deed of trust and filed a petition for a receiver. You may state, in that connection, if you would have taken either one of these steps, without the other; that is to say, would you have made the deed of trust without having a receiver appointed? A. *No, sir; I do not know that we would; that would have accomplished only half of the purpose to have done that.* [Print. Rec., 134.]

The firm of Benedict, Melone & Co. never did any more business after that time.

On cross examination, witness was asked:

Q. Don't you remember that the purpose was to ascertain the amount that was coming to each partner, and pay off all the debts? A. Well, the purpose of the whole business was to secure the banks and pay them in full, and the purpose of the receiver was to pay the balance of the creditors *pro rata.*

He further stated: That he never had any idea of continuing the business after he heard of the failure of the Macon banks, and that he and Melone went down town, on the morning of the 16th, for the *purpose of closing out the business entirely.* [Print. Rec., 144.]

Q. You did not consider this a failure; you were simply attempting to make a provision against trouble that might arise, on account of J. B. Melone's complication with the Macon City Savings Bank? A. *No, sir, I considered it a failure; it amounted to the same thing.* He thought that they fully determined upon their course before proceeding to dispose of the property in the manner stated. *It would have accomplished but one half of their purpose to have appointed a trustee,* without also having a receiver to take charge of the property after the payment of the Kansas City banks. As a matter of fact the deed of trust may have been executed first and the other afterwards. "*Our purpose was definite enough.*" [Print. Rec., 154.]

Q. What purpose was it? A. To pay the banks off; make a deed of trust in favor of the banks, and appoint a trustee, or a receiver, to wind up the business and pay off the balance. [Print. Rec., 154.]

Q. Now, when you went to Mr. Craig's and Messrs. Karnes & Ess', you had determined on no particular line of action? A. Well, the idea was when I went there to make an assignment; that was the idea exactly. *I went there to make an assignment to Chas. Stewart.* This thing came up afterwards and was talked over. Then it was decided to prefer the banks. [Print. Rec., 155.]

L. F. WILSON, vice-president of respondent Bank of Commerce, testified, on direct examination, as follows:

After receiving information from the newspapers, or Mr. Stewart, that the Macon City banks had failed, he went down and interviewed C. H. Benedict and R. A. Melone, and told them that they had better secure his bank, and that, if they did not, he would attempt to secure himself, before somebody else got the start. They replied that they wanted to do what was right, and were solvent, unless the failure of the Macon banks should jeopardize their affairs, and complicate them, in such a way that they could not pull through. He suggested that they, Benedict and Melone, come and consult his bank's attorneys, Karnes & Ess, in regard to the matter, and have the papers drawn up. The parties then went to Karnes & Ess' office. [Print. Rec., 161.]

On cross examination: He stated that he knew J. B. Melone was a member of one of the Macon banks, and anticipated that the Macon bank failures would produce confusion in the business of Benedict, Melone & Co. at Kansas City, and, for that reason, he wanted his bank secured. His understanding of the matter was that R. A. Melone and C. H. Benedict wanted to *turn over their property to satisfy the debts of Benedict, Melone & Co., but not the debts of the Macon banks; that is, to secure their own creditors, as against those of the Macon banks;* first paying the Kansas City banks. The minutiæ of doing the thing was left to the attorneys. [Print. Rec., 167 and 168.]

On re-direct examination he was asked:

Q. Then is it true that before the delivery of the deed of trust you understood that Benedict, Melone &

Co. were to dispose of all of the property of the firm of Benedict, Melone & Co. in one transaction, including the deed of trust as part of it? A. My recollection of it was that the *total assets were to be in the hands of Stewart, as trustee, first, to pay the banks; second, to apply upon the indebtedness to other parties, and, third, to return the residue to the individual partners.*

Q. *In other words, the partnership was to be wound up?* A. *That was my understanding; that this deed of assignment would cover all the grounds.* I do not know that I ever read it or heard it read. [Print. Rec., 169 and 178.]

On re-cross examination he was asked:

Q. Did you understand, then, that Melone and Benedict intended to dispose of all this property for the benefit of all the creditors of Benedict, Melone & Co. in some way? A. I understood that they wanted to see their debts paid. [Print. Rec., 171.]

CHARLES STEWART testified, on direct examination, as follows:

The first intimation he had of the failure of the Macon Banks was from R. A. Melone, who came to see him at his house, and told him of the failure and how it affected the firm here. He also stated to Stewart that a messenger had brought the news from J. B. Melone to the effect that the banks had gone up, and that he wanted C. H. Benedict and R. A. Melone to protect the mercantile creditors of Benedict, Melone & Co., as against those of the Macon banks. R. A. Melone expressed a wish for witness to act and take charge of the stock in some way, so that it could not be attached by the creditors of the Macon banks. He also told him that his brother, J. B. Melone, wanted some kind of an assignment made, and wanted to secure the creditors of the firm here in preference to the Macon bank creditors. He first refused to act. After coming up to Mr. Craig's office, he consulted his lawyers, Karnes & Ess, and concluded that *if Benedict and Melone would secure the Kansas City Savings Association, and the other Kansas City banks, that he would act as assignee, or in some capacity, to wind up the business.* [Print. Rec., 193 and 194.] His recollection is that after the deed of trust was made, it was a question what it was best to do about the balance of the property, and they consulted as to the

means of disposing of it, as they knew they had more than enough to pay the bank claims. They suggested to make him, Stewart, assignee, and either Mr. Craig or Mr. Ess said if he was appointed assignee the papers would have to be sent down to Macon for J. B. Melone to sign. It was finally agreed to have a receiver appointed as the best way out of it. They, Benedict and Melone, wanted him, Stewart, *to wind up the business in some capacity*. He would not do anything unless they preferred the banks. He made it a *sine qua non*. [Print. Rec., 196.]

On cross examination: He stated that R. A. Melone told him of the failure of the Macon banks, and of the message, or letter, received from J. B. Melone, and that the latter wanted an assignment made to him to act as assignee; that his understanding of the matter was that they wanted to make *some disposition of their property here*, so as to protect their firm creditors, as against those of J. B. Melone. His recollection was clear that there was some conversation between him and them in regard to their wanting a deed of assignment for the benefit of their creditors, and as to the best way to make one. Under no circumstances would he have acted in the disposition of their property, either by assignment or otherwise, unless the banks had been preferred first. [Print. Rec.]

Q. Did you not state some time ago, in your examination, that you supposed you would have to wind the concern up in some manner—that is, you would be appointed assignee or receiver, and wind it up in connection with the deed of trust? A. I suppose so, after the deed of trust; that was first. I would not accept, or have anything to do with it, unless they made the banks preferred creditors. After that, I did not know really how they would wind it up. I understood if they made an assignment, I was to be the assignee, and if they had a receiver, I supposed I would be receiver. [Print. Rec., 203.]

It is admitted by stipulation in the case [print. rec., 157–159], that the partnership indebtedness was about $115,000 on February 16, 1882, the day of the transfer, and that in Stewart's report, as receiver, he shows $36,273.24 on hand for the general creditors, after having paid off the bank claims, in March, 1882—the total in-

ventory of the firm's assets being $71,947.60. [Print. Rec., 210.] From which it will appear that the firm were hopelessly insolvent. That part of Mr. Ess' brief (pages 96 to 100), devoted to showing that the firm thought its assets would exceed its liabilities by about $18,000, and, for that reason, it was deemed advisable to have a receiver appointed for the principal purpose of stating an account between the partners, thereby getting rid of J. B. Melone's interest, and dividing this $18,000 surplus between them, is not very responsive to the questions involved in this case. An assignment made in the usual way would have been good, as has been shown, without the signature of J. B. Melone, and notwithstanding the resident partners may have thought, under the pressure of the banks and their general surroundings at the time, they would have something left after their debts were paid.

The law is well settled that

"The solvency of the debtor, in his own estimation or in fact, will not, apart from statutory provisions, unless connected with other evidence of fraud, invalidate an assignment." [Burrill on Assignments (4th Ed.) Sec. 2, p. 5; *Ogden vs. Peters*, 21 N. Y., 23; *Livermore vs. Northop*, 44 N. Y., 107.

The complainants charge, in their bill, that though there was a *defeasance clause* in said deed, it was in fact intended, by the aid of the proceedings, to settle the partnership, and for the appointment of a receiver, to absolutely and fully dispose of all their partnership property, and to appropriate it to the payment of their firm debts, so far as the same would go, after first paying the banks in full. Now, what was the meaning of the transaction in which the parties engaged?

Was the deed made for the purpose of merely securing the bank claims, subject to a GENUINE AND TRUE DEFEASANCE, or, was it a conveyance, in trust, to a trustee for the PURPOSE OF RAISING FUNDS TO PAY THE INDEBTEDNESS to the banks? If the former, then it has the elements of a mortgage; if the latter, it constitutes, and can only be, an assignment.

A mortgage can no more be a genuine mortgage without a *bona fide* condition of defeasance than a deed, absolute on its face, can be a genuine deed, where it is held subject to a defeasance, converting it into a mortgage, as shown by the authorities above mentioned.

R. A. Melone says the banks were to have the *first money that came in to settle their debts*, and, after that, the *balance* of the property was to go to the other creditors. Now, what first money does he mean? Manifestly, the first that Stewart was to take in. The possession was given Stewart by the deed and otherwise. He, only, was authorized to sell the goods for money, with which to *pay debts*. Melone states that Stewart was to *wind up the business*, and, when he had paid off the bank claims, he was a *trustee to hold the balance of the property for the other creditors*, and that, by the proceedings had on February 16, 1882, they disposed of and *appropriated* their *entire property* to the payment of their debts, and have had no control over it since that time. C. H. Benedict says their first purpose was to make a *straight, square assignment*. Their final conclusion was to pay the banks in full, and distribute to the other creditors, *pro rata*, the *balance of the money to be derived from their property*. He says, further, that Stewart was also appointed receiver *for the balance, to receive money and pay it out, and wind up the business*. That both proceedings were *determined upon at the same time*, and by means of them it

was intended to *wind up the business*, pay off the banks, and then pay the balance to the other creditors, *and that neither proceeding would have been had without the other*. L. F. Wilson says they wanted to turn over all their property to *satisfy the debts* of Benedict, Melone & Co., and secure their own creditors, as against those of the Macon banks; that he understood *their total assets were to be placed in Stewart's hands, as trustee, first, to pay the banks; second, to apply upon indebtedness to other parties, and third, to return any residue to the partners*. Charles Stewart says he understood they wanted to make *some disposition of their property* to protect their firm creditors, as against those of the Macon banks, and that *he was to wind up the business as assignee, or receiver, or in some capacity*.

These different statements are all consistent with each other, and can have but one meaning as to the determination of Benedict and Melone to dispose of their firm property. Where is there any evidence whatever of an intention *on their part* to pay the bank debts and *reclaim their property? They had no intention or expectation whatever of paying this indebtedness, otherwise than through the trustee, Charles Stewart, and out of the property conveyed to him*. He it was, who was to sell within five days after they were due and pay the debts off; he it was, who was to be, and was appointed, receiver of Benedict, Melone & Co., and who also took possession of all the property. They had no other property with which to pay debts. The conclusion is inevitable.

There can be no question that there was a *complete dedication* and an *absolute appropriation* of the property to the *payment* of their debts. Nothing else was expected or intended; nothing else was done, and they intended, then and there, to wind up their business. In the

nature of things, they did not expect, and had no reason to expect that they would be able to continue their business, after thus disposing of all they had for the purpose of paying debts, so far in excess of their assets. As Benedict says, "*it was a failure,*" *and they acted, too, on the basis that it was in fact a failure. In effect, Benedict and Melone said to Stewart:*

Take this property, convert it into a fund, out of which, first pay the banks in full, and then pay the other creditors in proportion to their claims, and if anything is left, return the residue to us.

Where is the defeasance condition in such a transaction? There is none, and though inserted in the deed, it has no significance under such circumstances.

The trial court, in the 3d division of its certificate, finds the fact to be that the respondent *banks and Stewart agreed to the plan*, adopted by the partners, in administering the assets of their insolvent partnership, and by reason of which, they are now precluded from saying they did not know what disposition was to be made of the property, further than their preference.

The evidence shows conclusively that, while the intention of the banks, and their attorneys, was to obtain a preference before anything was done (and this, too, in the face of the highly solvent condition of the firm, which respondents *feign* to have supposed), R. A. Melone and C. H. Benedict, from the time they received the letter from J. B. Melone in the morning until the last thing was done in the evening, had before their minds but one object, and that was to so dispose of all their property that their partnership creditors should get the full benefit of it, as against those of the Macon banks, and the fact of eliminating J. B. Melone's interest was a matter of secondary importance and cut no figure in determining on the receivership. Being un-

skilled in legal matters, the machinery to attain that end was in fact directed by Mr. Ess, who was principally interested in protecting and securing the banks, though as a matter of fact he, also, represented the debtors (R. A. Melone and C. H. Benedict), and Stewart, as trustee and receiver. Considering their surroundings, the importunities of Stewart and his refusal to act unless the banks were preferred, and the threatened attachments, were calculated to induce the preferences. But this, by no means, shows an abandonment of their design to assign or to dispose of all their property in some way for their creditors. It merely shows they were willing to prefer the banks in such disposition of their property, and nothing more. Whether the preferences, when made, would be good or not, was a question with which they had no concern and knew nothing about. *A person may in good faith intend to secure a creditor in a deed of assignment, but it will not be urged, for a moment, that any such attempted preference will be good if made.*

There is no doubt that the banks wanted to be secured, and that Benedict and Melone consented to prefer them, and meant to do so in the deed, but such *mutual desire does not neecssarily validate the preferences.* On the contrary, the legal effect of the deed, creating them, is to be determined by the well known distinction, which has been so fully submitted, between a deed of trust and a deed of assignment in this State. If the firm of Benedict, Melone & Co. did not intend to pay the bank claims and to reclaim the property conveyed in the deed, but did intend to appropriate their property to the payment of their debts, first preferring the banks, and with the residue thereof for their other creditors, then such disposition, *despite the intent of said banks,* will constitute an assignment. It is the *fact of such dis-*

position having been made, at which the law arrives, and when that fact is once established, the conclusion attaches that the act of the grantors, in so disposing of their property, is an assignment. If their first and only object, at the time, had been to secure the Kansas City banks, this could have been done effectually without any proceeding, to settle the partnership and appoint a receiver; but Benedict and Melone both say the giving of the preference alone would not have accomplished their purpose, *which was to devote their whole property to their partnership creditors.* The fact that a receiver was appointed to take charge of the property, taken in connection with the original purpose on their part to make an assignment, subsequently changed, it is true, to the extent of the preference in favor of the banks, and the further fact that, through the whole transaction, they continually talked about an assignment, show clearly that they had *a settled purpose to wind up their business, and devote their property to the payment of their debts;* but in doing this it was not their *legal privilege* to convey all their property to Stewart *in trust to pay the banks.*

If all this be true, then the transaction falls within the doctrine of the authorities, heretofore cited, in which the courts declare the law to be that it has *every element of a trust for the benefit of creditors, and must be regarded as an assignment of that character, notwithstanding the form of words used in the several instruments.* A trust was created, then, for the benefit, not only of the banks, as preferred creditors, but, of all the creditors of Benedict, Melone & Co., in proportion to their respective demands. The statute regulates such transfers of a debtor's property, and annuls the preferences, attempted to be created thereby.

The result, or effect, of these several acts of the partners are precisely the same, as if they had made a voluntary deed of assignment, in the usual form, to Charles Stewart, except with the provisions therein that the Kansas City Banks should first be paid by the assignee in full, and the remainder distributed *pro rata* amongst the other creditors, in proportion to their respective demands. It will be conceded by all that such preferences, attempted to be created by such deed of assignment, would be void, and the creditors share equally in such assigned estate.

All of which is respectfully submitted.

DOBSON & DOUGLASS,
Solicitors for Appellants.

C. L. DOBSON,
of Counsel.

Office Supreme Court U. S.
FILED.
OCT 15 1889
JAMES. H. McKENNEY.
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

IN EQUITY.

On Appeal from the United States Circuit Court for the Western Division of the Western District of Missouri.

THE UNION NATIONAL BANK OF CHICAGO, AND OTHERS,
Appellants,

vs.

THE BANK OF KANSAS CITY, AND OTHERS,
Respondents.

SUPPLEMENTAL BRIEF

BY

G.C. DOBSON & DOUGLASS,
For Appellants.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRS., 613 DELAWARE ST.
1889.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNION NATIONAL BANK OF CHICAGO, AND OTHERS,
Appellants,

vs.

THE BANK OF KANSAS CITY, AND OTHERS,
Respondents.

Supplemental Brief for Appellants.

Since the filing of appellants' briefs in October, 1888, there have been two important adjudications, bearing on the assignment question, to which we desire, briefly, to call attention. They are:

White et al. vs. Cotzhausen, decided in January, 1889, by this court, and reported in Supreme Court Reporter, vol. 9, p. 309.

Hagardine vs. Henderson, 97 Mo. 375.

In the case of *White et al. vs. Cotzhausen, supra*, the Illinois Voluntary Assignment Act is construed. From the statement of facts, it appears that the debtor, one Alex. White, Jr., being insolvent, and realizing that he could no longer continue business, determined to yield the dominion of his estate, or, in common parlance, to give up and quit business, and, in furtherance of such

design, and in order to create preferences in favor of certain of his creditors, who were his relatives, and cognizant of his intentions, he executed conveyances of his real estate, a bill of sale of numerous pictures, a judgment by confession and other transfers of his property.

The appellee, Cotzhausen, contended that the conveyances, and transfers, were void as in contravention of the thirteenth section of the Assignment Statute for the benefit of creditors, which is the same language as that used in Sec. 39, Rev. Stat. of Mo. for 1855. [See appellants' brief, p. 52.]

Mr. Justice HARLAN, delivering the opinion of the court, says:

"He (meaning the debtor) recognized his hopelessly insolvent condition, and formed the purpose of yielding to his creditors the dominion of his entire estate; and it is too plain to admit of dispute that, in executing to his mother, sisters and brother, the conveyances, bill of sale, warrant of attorney, and transfers in question, his intention was to give them, and their intention was to obtain, a preference over all other creditors. What was done was in execution of a scheme for the appropriation of his entire estate by his family, to the exclusion of other creditors, thereby avoiding the effect of a formal assignment. The first question, therefore, to be considered, is whether the several writings, executed by Alexander White, Jr., for the purpose of effecting that result, may be regarded as, in legal effect, one instrument, designed to evade, or defeat, the provisions of the statute of Illinois, known as the Voluntary Assignment Act, in force July 1, 1887."

After an examination of *Preston vs. Spaulding*, 120 Illinois, 208, he concludes that the main object of the legislation on the subject was *to secure equality of right among the creditors of a debtor who makes a voluntary assignment*, and the statute being remedial, must *be liberally construed*, "so as to suppress the mischief and advance the remedy." Avoiding over-strict construction,

and at the same time regarding substance rather than mere form, it was held that the several writings executed by White "*must be deemed a single instrument, expressing the purposes of the parties in consummating one transaction*, and operating as an assignment or transfer, under which the appellee, Cotzhausen, may claim equality of right with the creditors so preferred."

In Illinois, as in Missouri, the common law right of a debtor, even when financially embarrassed, to prefer his creditors in the ordinary course of his business, is clearly recognized as not in contravention of the Assignment Statute of either state, and in neither is a debtor bound to succumb to temporary reverses in his affairs; on the contrary, he may use his property as he pleases in order to avoid making an assignment, in the sense of giving up the dominion of his estate; but, when he realizes that he is no longer able to continue business, and determines to quit and yield up his dominion to others, then the transfers, effectuating that end, will be construed to operate as an assignment, no matter what may be the form of the instrument, or instruments, by which they are made.

Such is the doctrine of this court, which very properly reasoned that, if Alexander White had made a formal assignment of his property for the benefit of his relatives, its illegality would have been apparent, and yet by the other transfers, executed by him, he accomplished, substantially, the same thing. The one course is forbidden by the letter of the statute, and the course he adopted is equally forbidden by its spirit.

"*Surely the mere name of the instruments by which the illegal result is reached ought not to be permitted to stand in the way of giving the relief contemplated by the statute. Courts of equity are not to be misled by mere devises nor baffled by mere forms.*" [P. 313.]

The statute of Illinois is silent as to the form of the instrument, or instruments, by which a debtor may effect an assignment.

White vs. Cotzhausen, p. 311.

The same is true of the Missouri statute. The law as to the debtor's right to prefer, is substantially the same in both states. We confess, under these circumstances, we know of no reason why the doctrine enunciated in *Preston vs. Spaulding*, *supra*, and *White vs. Cotzhausen* [see p. 312] should not hold good in Missouri.

It is true that the Supreme Court of Missouri, in 1855, in construing a statute then in force, and similar to that in Illinois, arrived at a somewhat different conclusion, that is, it decided that, as between the creditors designated in the deed, there should be no preference [See appellants' brief, p. 52], while the Supreme Court of Illinois goes further and annuls all such preferences. In other words, the effect of this Illinois construction is the same exactly as that given to the present Missouri Assignment Statute, in force since 1865.

This difference of construction, as to the annulling of preferences, is a matter of no concern, as regards the application of the doctrine of this *White vs. Cotzhausen* case to that at bar, and, especially so, in view of the fact that the intent of the Assignment Statutes of the two states, as to preferences, is alike, in that they are equally prohibited and annulled, and all creditors share in proportion to their respective demands.

The real question here involved, is, *as to the kind of disposition made by a debtor of his property which will constitute an assignment* under the provisions of the Missouri statute, and, in this connection, the form of the instruments used for that purpose are by no means con-

clusive as to the character of the transaction accomplished thereby.

We take it, that the Illinois case is in point, and a the latest adjudication of the highest court in the land, is entitled to great weight, in the case at bar.

The Hargadine-Henderson Case Considered.

This case of *Hargadine vs. Henderson, supra*, is relied on by the respondents as authority for their position that the deed of trust in controversy, conveying all the property of Benedict, Melone & Co., does not operate as an assignment. When closely analyzed, and the nature of the instrument in controversy, and its surroundings, taken into consideration, appellants urge that the doctrines enunciated therein do not militate against their position in the case at bar. The instrument itself, and the reason for making it, were so peculiar in themselves, that we quote from pp. 387-8, wherein the court say:

"By its recitals, the instrument purports to be a deed of trust in the nature of a mortgage, but its real character cannot be thereby concluded. *That must finally be determined by the effect of the operation of its terms upon the property in its situation at the time of the execution of the deed.* The property conveyed consisted of the grantor's stock of goods, his notes and accounts, one hundred and fifty-two shares of stock in the Hall Association, two shares of bank stock, and ten shares of railroad stock. The stock of goods was encumbered by the chattel mortgage and the execution liens for the judgment debts set out in the deed. The shares of stock were all pledged to the bank as collateral for the debts due it, recited in the deed. The creditors secured by the deed of trust had thus already tied up and secured for their debts all of the property conveyed by the deed, except the notes and accounts, the value of which does not appear. A delivery bond had been executed by the grantee, with Harrison and Birch as his securities, in double the amount of the value of the goods. A tornado had recently partially destroyed the building of the association in which he kept his store and of whose stock his

one hundred and fifty-two shares represented the controlling interest. He is in possession of his goods but cannot dispose of them except at the hazard of his sureties. They must be forthcoming on the day of sale for their protection. Unless his situation is relieved, his goods must go to forced sale under the hammer, his share of stocks probably sacrificed by a like sale, by reason of the ruinous condition of the property of the association, which it in part represents. The prospect is that his property will be sacrificed, and the very debts, for which sacrificed, either not fully paid, or, if paid, that no such excess will be left over for him or his unsecured creditors, as the real value of the property ought to produce. To avoid this, his goods must be sold, as near as the situation will permit, in the usual course of business, so that they may bring something like their real value. A loan must be raised for the purpose of restoring the building of the association, so that his shares of stock, when sold, may command something like their true value. To effect these objects is the plain purpose to be read upon the face of this instrument. To carry it out, it was necessary that his sureties on the delivery bond, one of whom was the grantee, should be indemnified, and that a fund should be raised as a basis for a loan to be applied to the expense of restoring the building, on the value of which depended the value of the shares of stock. The ultimate object, of course, was the payment of the debts by which the property was encumbered, and to secure as large an excess for the grantor as possible. If it were necessary to define this peculiar instrument, *it might be called a deed of trust to idemnify sureties and to preserve the value of securities.*"

In this case, the court announces the well settled distinction between a deed of trust, which is a security for the payment of debts, and a deed of assignment, which is an absolute appropriation of property for their payment; it further states, as distinguishing the two, that in the former, as in a mortgage, the grantor retains an equitable interest, or right of redemption, in the assigned property, while in the latter, both the legal and equitable title passes to the assignee, and beyond the assignor's control. It says:

"Reading the instrument, then, as a whole, *in the light of the circumstances under which it was executed, was it intended as* a security, or as an absolute, unconditional conveyance of all the grantor's interest in the property, both legal and equitable, to the exclusion of any equitable right of redemption. *So far as the intention of the parties appears by the recitals*, the conveyance was intended to secure debts, and protect and save harmless the grantor's sureties against contingent liability on an obligation they had entered into with him; one of whom was grantee in the deed of trust."

In determining the queston, then, whether a given instrument operates as a deed of trust, or of assignment, as the case may be, it must, necessarily, be read in the light of its surrouudings; if the intention was only to secure, with the equity of redemption retained by the debtor, then it would be a deed of trust, in the nature of a mortgage; if, however, the intention was to absolutely appropriate the property to the payment of debts, in which case, both the legal and equitable title passes, then it would be an assignment.

It is evident from the authorities, that the *intention*, as well as the naked right to redeem, cuts an important and controlling figure in the matter.

In the case at bar, and independently of the actual intention of the debtors, Benedict, Melone & Co., we contend that *they never retained an equity to redeem* their property from the deed, preferring the respondent banks. On the contrary, in the third point of the certificate of division of opinion, the fact is found to be, that the making of the deed of trust, and appointment of a receiver, were done on the same day, and as part of the proceedings to administer the assets of the insolvent partnership, and to which the banks, and Stewart, and the partners, all agreed.

In other words, the execution of the deed of trust, and the receivership, together constituting the proceedings adopted by the parties to administer the partnership assets, they are one transaction, and the effect of the deed is necessarily dependent on a consideration of the receivership.

Now, *what was the effect of the receivership, as qualifying the deed of trust?*

It is well settled in Missouri, that the title of the receiver to the property, which is the subject of the receivership, attaches from the date of the order of court appointing him, and is not deferred until he gives bond.

Maynard vs. Bond, 67 Mo. 315.

In this case, Chief Justice SHERWOOD says:

"A receiver is said to be uniformly regarded as an officer of the court, exercising his functions but for the common benefit of all parties in interest. He is elsewhere spoken of as the hand of the court, and the property or fund intrusted to his care is regarded as in *custodia legis*, and *that his appointment is in effect, an equitable execution.*" [Page 317.]

High on Receivers, Sec. 1 and 2, and cases cited.

Again, he says:

"Then the title of the partners to control, dies, and then the title of the court, and of its agent and officers, immediately succeeds." * * * "The order of the court, either impliedly or expressly takes the title from the parties, and vests it in the receiver from that moment. It is enough, however, if it took it from the parties; after that, no execution against them could be levied upon it." [See page 318.]

By the course adopted, the partners absolutely appropriated their property to the payment of their debts, and *abandoned the equity to redeem*, which they might have retained, *if they had simply made the deed with only the intention to secure the banks.* When the receiver's right attached, theirs was at an end. They re-

tained no equity to redeem, and for this reason, the Hargadine case is not in point.

We readily concede that, if a debtor makes a deed of assignment, he has the legal right to, afterwards, pay his creditors, and have the assignee discharged, and the property conveyed back to him, but the fact that the debtor may, by some means or other, bring about a condition of things, which will enable him to so adjust his liabilities, and thereby, again, gain control of his property, by no means vitiates the assignment. So it is, in the case at bar; the fact that the debtors may have redeemed their property from the effect of the deed of trust, and otherwise arranged with themselves, and their creditors, so as to have secured a dismissal of the receivership proceedings, by no means militates against our position, that the disposition of the partnership property, by reason of the deed of trust, and the receivership, for the payment of firm liabilities, was complete and final, and there remained no equity to redeem in the partners. The appropriation for such purpose was all that could have been made, had a deed of assignment, in regular form, been executed.

As a matter of fact, however, the partners, by the receivership proceedings, dissolved their partnership and asked for an accounting between themselves, after first paying their liabilities; their relation as partners, engaged in the ordinary course of business, at once ceased, and we are at a loss to understand how it was possible, under the circumstances, for them to have retained an *equity to redeem their property.*

If they did not, then the appropriation of the property to the payment of their liabilities was complete and consummate, and the transaction, by which it was brought

about, was unquestionably an assignment under the Missouri statute, and the answer to the third point in the certificate of division of opinion must be in the affirmative.

All of which is respectfully submitted.

DOBSON & DOUGLASS,
Counsel for Appellants.

IN THE

Supreme Court of the United States.

NO. 381.

THE UNION NATIONAL BANK, OF CHICAGO, AND OTHERS,
Appellants,
vs.
THE BANK OF KANSAS CITY AND OTHERS,
Respondents.

BRIEF FOR RESPONDENTS.

By HENRY N. ESS.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRINTERS, ALAMO BLDG., KANSAS CITY.
1888.

IN THE

Supreme Court of the United States.

NO. 381.

THE UNION NATIONAL BANK, OF CHICAGO, AND OTHERS,
Appellants,
vs.
THE BANK OF KANSAS CITY AND OTHERS,
Respondents.

BRIEF FOR RESPONDENTS.

This was a suit in equity, begun in the State Circuit Court of Jackson County, Mo., March 23d, 1883. It was removed to the Circuit Court of the United States for the Western Division of the Western District of Missouri on April 11, 1883, on the ground of citizenship of the parties. [Printed record, pages 16 and 17.] This transcript was filed in the clerk's office April 30th, 1883. The case was tried on the second amended bill. [Printed record, pages 52 to 61.]

This amended bill, after setting up facts as to citizenship and amounts of the several debts, sets out the making of a deed of trust by Richard A. Melone, a member of the partnership of Benedict,

Melone & Co., wholesale grocers at Kansas City. This was on February 16, 1882; that at the time this deed of trust was made to secure these banks the partner, C. H. Benedict, filed a petition in the Circuit Court of Jackson County, Missouri, against his co-partners, Richard A. Melone and James B. Melone, to wind up the partnership, ascertain and pay its debts, to take and state an account between the partners, and pay to each what was due to him. Chas. Stewart was appointed receiver; that the firm owed other creditors besides these banks; that Benedict, Melone & Co. were insolvent; that J. B. Melone lived lived at Macon City, Missouri; was engaged in other and numerous callings; that he wrote his partners to make a general assignment for the firm creditors. Benedict and R. A. Melone made the deed of trust and made no assignment. That Jas. B. Melone did not know of this deed of trust or approve it, and that, therefore, the deed of trust is void. That plaintiffs and other creditors have an equitable lien on the property. That it was intended by the deed of trust and the winding up proceedings to dispose of all the firm property, and that all these proceedings were a fraud on the Missouri Assignment Law. That by reason of the premises the deed of trust is a voluntary assignment. That as assignee it was Stewart's duty to qualify by taking the oath and giving the bond required by the State Statute. That he had failed to do so. That Stewart denied that other creditors had any right under the deed of trust. That under the deed

of trust Stewart sold the property and paid the debts to the secured banks, amounting to $19,000. Some trouble was apprehended and the banks gave him an indemnity bond. That Stewart paid this money as trustee and not as receiver. That as receiver Stewart had paid these creditors certain amounts under orders of Court, and as to the balance after paying these bank debts, these creditors had gotten the same amount of money they would have gotten if he had acted as assignee. The prayer of the bill is that this deed of trust be decreed to be for the benefit of all the creditors of Benedict, Melone & Co., and that the banks be decreed to pay into the registry of the court the amounts paid them by Stewart, to be distributed to all the creditors, or that this deed of trust be decreed a voluntary assignment for all the creditors, and that Stewart be decreed assignee, and be required to give bond as required by the Missouri Assignment Law. That Stewart be required to account for the money paid by him under the deed of trust to these banks, and that the banks be compelled to pay back this money to Stewart and for general relief.

An answer under oath is not waived. The answer sworn to is on pages 31 to 45, printed record. It sets out that those debts were paid by Stewart to these banks on March 8th, 1882, just twenty days after the deed of trust was made, and more than one year before this suit was begun. That this was done to save accruing interest. That the creditors of Benedict, Melone & Co., by leave of Court,

attached the property of Benedict, Melone & Co. in Stewart's hands, the first attachment being that of Armour Bros. Banking Company, a Kansas City corporation. That the attachments were in amount sufficient to take all the firm property. That the plaintiffs in this case became parties to the winding up proceedings by coming in and proving their debts and receiving their dividends; that complainants well knew the names and the citizenship of all the creditors; that their places of residence appeared in the debts proved by them, as well as the amounts of their debts. Their ignorance was feigned to give jurisdiction to the United States Circuit Court. The answer submits that all the creditors can just as well be made parties to this suit as they were parties to the winding up proceedings, to which suit these complainants became parties by proving their debts and accepting dividends. The answer copied the deed of trust.

Complainants filed a replication. In it they admit that the deed of trust copied in the answer is the same paper referred to in the bill. They aver that this paper, by virtue of things set up in the bill, was a voluntary assignment. They deny that Benedict and Richard A. Melone intended to make a deed of trust, but did so only by the importunities of the respondent banks and of Stewart, and because Stewart refused to act as assignee: they affirm Richard A. Melone's authority to make a voluntary assignment—deny his authority to make a deed of trust. Certain persons filed an intervening petition.

This is on pages 62 to 66. It is brought by the same attorneys who filed the original bill. These were the Kansas City and St. Louis creditors about whose existence and names complainants are so densely ignorant.

The testimony was taken as usual. It is on pages 78 to 225, printed record. The case was tried May 27th, 1885, before the District Judge and the Circuit Justice. The bill was dismissed. The decree is on page 67, printed record. There was a division of opinion between the Circuit Justice and the District Judge. This is on page 67 *et seq.*, printed record. It is as follows:

"Is the instrument of writing in this case called a deed of trust, which we find, as a matter of fact, conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart, as trustee, as surety for the banks therein named, void for want of the assent of James B. Melone, one of the partners, which was never given to that transfer?" Then follows a copy of the deed of trust.

"2d. As James B. Melone did give his previous assent and direction to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under Section 354 of the Revised Statutes of Missouri of 1879?

"3d. Does the making of that deed of trust and the appointment of a receiver, who is the same person as the trustee, on the same day, and as part

of the proceeding to administer the assets of the insolvent partnership to which the banks, and Stewart, and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors, and require the receiver to administer the funds in his hands in that manner?" This is signed by the Circuit Justice and District Judge.

Is this deed of trust, conveying all the partnership property to Stewart, as trustee, to secure the debts to respondent banks, void for want of the assent of James B. Melone, one of the partners?

The business of the partnership was that of wholesale grocers at Kansas City. James B. Melone did not live at Kansas City, nor manage the business at Kansas City. He was president of a bank at Macon City, some two hundred miles away, which service took all his time.

The active partners had authority, by virtue of being partners, to make a mortgage or deed of trust of all the partnership property.

In *Holt vs. Simmons*, 16 Missouri Appeals Reports, page 97 *et seq.*, is a decision covering this entire point. Like the suit out of which these proceedings in the case at bar arose, this proceeding in 10 Mo. Appeals, "was a suit brought by one partner against his co-partners and the firm creditors for the purpose of winding up the concern." [Page 100.] "The only question which arises upon this record relates to the claim of defendant Asbury Judlin upon a promissory note for $400, which, to-

gether with two other notes held by the defendant Delahanty, had been secured by a chattel mortgage *of all the tangible assets of the firm.*" The plaintiff Holt, the partner, resisted the allowance of this claim secured by chattel mortgage, "on the ground that the note and the mortgage securing it had been given by his co-partner, the defendant Simmons, after the dissolution of the partnership, without plaintiff's knowledge, consent or authority, express or implied." [Page 101.] "By consent of parties, a referee was appointed 'to take proof, audit and allow or reject all claims of the defendants and all others' against the firm, and to adjust the partnership accounts as between plaintiff and defendant Simmons, partners in said late firm. [Page 100.] *Both* the note and mortgage are held valid. Judge SEYMOUR D. THOMPSON renders the opinion, which is full and to the point.

See also:

Keck vs. Fisher, 58 Mo., page 532 *et seq.*
Flanagan vs. Alexander, 50 Mo., 50 *et seq.*
Topley vs. Butterfield, 1 Met. (Mass.), 515.

Blaisdell, one of the partners, testified: "If he had been present when the mortgage was given, he should not have executed it." [Page 516.] One of the partners "executed to the plaintiff a mortgage of the goods in question, being *the whole stock in trade* of the firm." [Page 515.]

Dickard vs. Case, 5 Watts, 22.
Anderson vs. Tompkins, 1 Brockenborough, 456 *et seq.*

Nelson vs. Wheelock, 46 Ills., 26–7.
McClelland vs. Remsden, 23 Howard's Practice, at page 179.
Patch vs. Wheatland 8 Mass., 102–3.
McGregor vs. Ellis, 2 Disney, 292–3.

"But it seems to be pretty well settled that one member of a firm can convey or pledge all the partnership effects directly to a creditor in payment or for the security of a debt due from the company if there be no fraud." [See *Moffit vs. White*, 2 Kernan, or 12 N. Y., page 454–5 *et seq.*] The question is here fully discussed and the authorities cited.

Ellis vs. Allen, Supreme Court of Ala.; reported in Vol. 2, Southern Reporter, at page 676 *et seq.*

On the power of a partner to mortgage the whole of the property, Judge SEYMOUR D. THOMPSON, of our Missouri Court of Appeals, 16 Mo. App. Rep., at page 114, says:

"The well settled rule under this head is, that every partner in ordinary cases, and in the absence of fraud on the part of the purchaser, has a complete *jus disponendi* over all the partnership personalty. He possesses full power and authority to sell, pledge and otherwise dispose of the entirety or any part of the goods, wares, merchandise or other personal effects belonging to the firm, and not merely his own share thereof, for purposes within the scope of the partnership. In respect of the

shares of his co-partners, he is deemed to do such acts as their agent and as the accredited representative of the firm. Each partner is treated without any nicety of discrimination, and is deemed to possess a dominion over the entirety of the property, and, therefore, clothed with all the attributes of ownership."

The Supreme Court of Missouri, in speaking on this point, in *Keck vs. Fisher*, 58 Mo., 534, says:

"It is now contended that Raber had no power to make the deed without a special authorization from the other partner, and that the acknowledgement is bad. The first point is surely not sustainable."

Here the Supreme Court of Missouri use almost the same language made use of by Judge THOMPSON in *Simmons vs. Holt*, 16 Mo. Appeal, 97, wherein the Court continuing, say:

"The same principle is announced by Chancellor KENT, who says: 'With respect to the power of each partner over the partnership property, it is settled that each one in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interests and is considered to be the authorized agent of the firm. He can sell the effects or compound or discharge the partnership debts. This power results from the nature of the business, and is indispensible to the safety of the business and the successful operations of the partnership. He is

agent of the whole for the purpose of carrying on the business.' [3 Kent Com., 44.] The result of the authorities is that the act of each partner is considered as the act of the whole partnership, or of all the partners within the scope of the business of the firm."

In *Deckard vs. Case*, 5 Watts., 23: "The defendant rested his case on two grounds: 1st. That the bill of sale of *the entire stock* of the firm by Lowe alone to the plaintiffs was illegal and vested no property in them." The Court, in rendering the opinion [page 24], say: "But is the power so limited that one partner cannot dispose of the whole of the partnership effects? In *Tax vs. Harbury*, Comp., 445, Lord MANSFIELD held, that each partner has the power singly to dispose of the whole of the partnership effects. The authority is implied from the nature of the business. Justice BRAINARD, in 4 Day's Rep., 430, expresses the opinion that one partner has the power of disposing of the whole."

Chief Justice MARSHALL, in rendering the opinion in the case of *Anderson vs. Tompkins*, 1 Brock., 459, said:

"The deed, as has already been stated, purports to convey the whole property of the concern and the private porperty of the partners. That property consisted of the effects of the partnership for sale, of real property and of debts. I shall consider the deed in its application to each of these subjects.

"*First*—The goods in possession for sale.

"The convenience of trade requires that each acting partner should have the entire control and disposition of this subject. It would destroy co-partnerships entirely if the co-operation of all the partners were necessary to dispose of a yard of cloth. It is, therefore, laid down in all the books which treat on commercial transactions, that with respect to all articles to be sold for the benefit of the concern, each partner, *though the others be within reach*, has, in the course of trade, an absolute right to dispose of the whole. 'Each,' says Watson, 'has a power to dispose of the whole of the partnership effects.' This is a general rule resulting from the nature of the estate, and from the objects for which men associate in trade. They are joint tenants without the right of survivorship; they are seized *per mi et per tout* and they associate together for objects which require that the whole powers of the partnership should reside in each partner who is present and acting. These general doctrines are universal and have not been controverted in this case; but it is contended that they do not authorize the deed made by Tompkins, because, 1st, This is not an act in the course of trade, but is a disposition of the whole subject and a dissolution of the partnership. 2nd, It is a preference to particular creditors, in making which Murray ought to have been cousulted. 3rd, It is by deed. It will be readily conceded that a fraudulent sale, whether made by deed or otherwise, would pass

nothing to a vendee concerned in the fraud. But with this exception I feel much difficulty in settling any other limits to the powers of a partner in disposing of the effects of the company purchased for sale. He may sell a yard, a piece, a bale, or any number of bales. He may sell the whole of any article, or any number of articles. This power would certainly not be exercised in the presence of a partner without consulting him, and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious and, perhaps, to fix on it the imputation of fraud. In this respect every case must depend on its own circumstances; but with respect to the power in a case perfectly fair, I can perceive no ground on which it is to be questioned.

"But this power, it is said, is limited to the course of trade. What is understood by the course of trade? Is it that which is actually done every day or is it that which may be done whenever the occasion for doing it presents itself; there are small traders who scarcely ever, in practice, sell a piece of cloth uncut or a cask of spirits. But may not a partner in such a store sell a piece of cloth or a cask of spirits? His power extends to the sale of the articles and the course of trade does not limit him as to quantity. So with respect to large concerns. By the course of trade is understood dealing in an article in which the company is accustomed to deal and dealing in that article for the company. Tompkins & Murray sold goods. A sale of goods

was in the course of their trade and within the power of either partner. A fair sale, then, of all or of a part of the goods was within the power vested in a partner. This reasoning applies with increased force when we consider the relation of these partners." * * *

The partner was absent in Europe and had left all in the hands of the remaining partner in Virginia. Richard A. Melone and Charles H. Benedict were the active partners here. James B. Melone did not live here and never sold any goods or took any part in the business. Continuing, Chief Justice MARSHALL says:

"Had this, then, been a sale for money or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason or in justice, between such a sale and the transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor he may thus pay a large one. The *quantum* of debt or of goods sold cannot alter the right. Neither does it, as I conceive, affect the power that those goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees for sale without necessity the transaction would be examined with scrutinizing eyes and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the

mode of sale be such as the circumstances require, I cannot say that the partner has exceeded his power.

"This is denominated a destruction of the partnership subject and a dissolution of the partnership. But how is it a dissolution of the subject? Can this appellation be bestowed on the application of the joint property to the payment of the debts of the company? How is it a dissolution of the partnership? A partnership is an association to carry on business jointly. This association may be formed for the furture before any goods are acquired. It may continue after the whole of a particular purchase has been sold. But either partner had a right to dissolve this partnership. The act, however, of applying the means of carrying on their business to the payment of their debts might suspend the operations of the company, but did not dissolve the contract under which their operations were to be concluded"—then he makes observations as to there being no consultation with Murray. He was absent. In this case there were preferred creditors. Chief Justice MARSHALL, continuing, said:

"The power of applying all the goods on hand for sale to the payment of the partnership debts is, I think, a power created by the partnership, and the exercise of it must be regulated by circumstances. In extraordinary cases an extraordinary use of power must be made. What is called the course of trade is not confined to the most usual way of doing business in the usual state of things. In the

absence of one of the partners in a case of admitted and urgent necessity, the power to sell may be exercised by the partner who is present and who must act alone in such manner as the case requires, provideed it be exercised fairly. In this case the fairness of the transaction is not impeached, and certainly upon its face it is not impeachable. So far, then, as respects the partnership effects, which were delivered, I have never, from the opening of the case, entertained a moment's doubt." This was a preference, too.

"One of the undisputed canons of the law of partnership is the right of each partner to sell the whole partnership property if the sale be free from fraud on the part of the purchaser." [*Whitton vs. Smith*, 1 Freeman, Ch. (Miss.), at page 238.]

In *Mobbitt vs. White*, 12 N. Y., 454, *et seq.*, stronger language is used.

The bill seeks to compel respondent banks to repay the money paid them by Stewart; it sets up that Stewart paid them, taking a bond of indemnity. One of these bonds is in the record at page 208. It is dated March 8, 1882. The deed of trust is dated February 16, 1882. [Printed record, pages 67 to 72.] It is filed for record February 16, 1882. March 7 and 8, 1882, these respondent banks write letters to him requiring him to pay them their debts, and if not paid suit would be brought. [Printed record, page 209.] The respondent banks were paid March 8, 1882. Stewart gave bond as receiver February 17, 1882. [Printed record, page

210.] The Court made an order to sell the property February 23, 1882. James B. Melone was a party to this writ. It is not shown that he was ignorant of the case or its purpose, as set out in the petition. He then knew that no assignment had been made. The partnership was composed of (3) three persons, James B. Melone (who lived at Macon City and took no active part in the business at Kansas City), Richard A. Melone and Charles H. Benedict (who were the active partners). There were three partners; two assent, the other does not. Is such a deed of trust void by reason of the want of assent by the non-resident partner? Are two, the majority, the active partners, bound to make an assignment merely because the third so desires? The two active, managing members of this firm of three, in the absence of the third, made this paper. Is this deed of trust void by reason of the want of assent of the third?

Again, Richard A. Melone and Charles H. Benedict, the resident managing partners at Kansas City, had authority to make these negotiable securities and get the money thereon from respondent banks. There is no question as to this power. The debts to these respondent banks have been paid—paid March 8, 1882, on the twentieth day after the making of the deed of trust. This bill seeks to make these banks refund this money for the benefit of other creditors, the complainants in this case.

"It is admitted that the entire indebtedness described in the deed of trust, executed by the firm of

Benedict, Melone & Co. to Charles Stewart, February 16, 1882, to the use and benefit of the Kansas City Savings Association, the Bank of Kansas City and the Citizens National Bank, was for money previously advanced by said banks, respectively, to said firm, and was then owing by said firm to said banks, and that said indebtedness is correctly described in said deed of trust." [Printed record, page 205.]

James B. Melone was a party to the suit in which a receiver was appointed. He must have known then that his directions were not observed. On February 17, 1882, the next day after making this deed of trust, Plankinton and others brought suit by attachment. He was a party to this suit. Fraudulent dispositions of property are charged as ground for this attachment. Defendants put in pleas in abatement to the attachment under oath on April 10, 1882. He was a defendant. From March 8, 1882, to March 18, 1882, seventeen attachments were issued against this firm. James B. Melone is defendant. Debts amount to about $20,000. [Pages 210 to 226, printed record.] Every fact in this case about making this deed of trust and the receivership is set out in an affidavit in one of the cases. [Pages 216–7, printed record.] The Judge, on March 11, 1882, allows the receiver to be garnished. James B. Melone is a party to this suit. Under the garnishment of Stewart, receiver and trustee, the validity of the trust deed, the receivership even, could have been tried. [*King vs. Bailey*,

8 Mo., 332 *et seq.*] If Richard A. Melone had no power to make this deed of trust, this could have been determined in these garnishment proceedings. This is the rule in Missouri. [*Hook vs. Stone*, 34 Mo., 329 *et seq.*] If the suits by attachment, brought by these complainants, The Union National Bank and Bernard & Lyman, had been successful, their debts would have been paid in full, and this suit would not have been heard of. They allowed the trustee to collect money and to pay these debts to respondent banks without objection. James B. Melone made no objections. Is this deed of trust void by reason of the want of assent of James B. Melone to its execution?

An additional consideration is this: The debt to these respondent banks was paid March 8, 1882, on the twentieth day after the deed of trust was made, without any objection from James B. Melone. The debt was a fair, honest debt; the case is free from fraud. By what process of law and by what rule of law or equity will James B. Melone wrest this money from the respondent banks, who have received it in payment of a fair debt? The creditor's right is dependent upon and derived from the right of the partner. These complaining creditors stand in no better relation or position. Hence, for the purpose of this bill, viz: for the purpose of making these respondent banks repay what they have received in payment of honest debts, this deed of trust is not void by reason of the want of assent of James B. Melone to its execution. Richard A. Me-

lone and C. H. Benedict assent to this deed of trust. The trustee takes possession under the deed. He has on hand $19,000, enough to pay these debts to respondent banks. The deed of trust is a perpetual direction to Stewart to pay these debts from this money. Richard A. Melone and Charles H. Benedict had the right to have this money applied to the payment of these firm debts, admitted to be fair and honest. Suppose C. H. Benedict and Richard A. Melone meet on March 8, 1881, with respondent banks. It is said that this deed of trust is void because James B. Melone did not assent to it. Then this money, $19,000, belongs to the firm. But, by consent of Richard A. Melone and Charles H. Benedict, without dissent from James B. Melone, Stewart pays it to respondent banks. In a proceeding by some other creditors against respondent banks to make them repay this money, is the deed of trust void by reason of the want of assent of James B. Melone to its execution, so as to compel these creditors to repay it? Respondent banks were diligent in the collection of an honest debt without objection from any source; their equity to collect their debt is at least equal to complainants' equity to collect theirs. For their firm, C. H. Benedict and Richard A. Melone by this deed authorized Stewart "out of the proceeds arising from said sale to pay off said indebtedness, or so much thereof as shall be unpaid." C. H. Benedict and Richard A. Melone never revoked this direction or attempted to do so. The money, the $19,000, was still

firm money. If they had paid off the debt prior to March 8, 1882, then the trustee would have been bound to pay it to the firm. Being in the hands of Stewart, being still firm money, being paid by the trustee without dissent from anyone on a fair debt, will this Court now say in favor of complainants that the deed of trust is void for want of the assent of James B. Melone to its execution?

Another point. A letter was written by James B. Melone to his partners at Kansas City, on February 15, 1882, at night. This letter was lost. He gives its substance thus: The letter stated "that it would be necessary for them to make an assignment, and that they had better do so as early as possible the next morning, and I suggested Mr. Stewart as a proper person to act as assignee." [Printed record, page 79.] Witness says [printed record, page 85], speaking of this last letter: "I can give it to you as I recollect it now. I told him of the failure of the Macon Savings Bank and also stated it would be necessary for them to make an assignment, I presume, and that they had better do it early the next morning, and suggested Charley Stewart a proper person for assignee, he being acquainted with the affairs, and I may have added or requested for them to make the Macon Savings Bank a preferred creditor if they could, I don't remember distinctly about that."

Benedict says [page 129]: "The letter was addressed to Benedict, Melone & Co., and signed by James B. Melone, and it went on to say that

their bank, the Macon Savings Bank, had made an assignment and that it would become necessary for us to do something of the same kind here, and he suggested Charley Stewart as a proper person to act as assignee—well I don't know as he said—yes, as I said before, he stated that it would be necessary for us to make an assignment. I know that is the word he used, and that Charley Stewart would be a proper person to act in that capacity, and I am under the impression that he asked us, if possible, to make the Macon Savings Bank a preferred creditor. Mr. Melone stated that the other day, and I have been studying about it since, and I think those are the words of the letter; that is, the purport of the letter; it was not very long." Again, same witness [page 128, (bottom) printed record]: "It did not say we must make an assignment. It said that the bank here made an assignment and it would probably be necessary for us to do something of the same kind here, and suggested Mr. Stewart as a suitable person to act in that capacity." * * * "I don't think it said we must make an assignment. There was nothing mandatory in it."

"This letter was simply advisory, then?" Ans. "Yes, sir, that is all."

Richard A. Melone says, this letter from James B. Melone stated, "that we had better make an assignment here." [Printed record, page 95.] So that the whole thing about the assignment was advisory. "We had better make an assignment."

These are complainants' witnesses.

James B. and Richard A. Melone and Charles H. Benedict did not know the law of Missouri, or there would have been no letter requesting an assignment with preference to the Macon Savings Bank. James B. Melone knew that the respondent banks had been preferred as creditors, and that at the time it was done. "How long after that (*i. e.* after he wrote this letter requesting or suggesting an assignment) was it until you learned what they had done in regard to making an assignment, or any similar action on their part?"

ANS. "I don't remember. Some days afterwards I received a letter from my brother stating that they had made an assignment and had preferred the banks here—made them preferred creditors. That is the only information I got with regard to it until months afterwards." [Printed record, page 79.]

"Well, after you wrote the letter on the night of February 15, 1882, did you receive any letters from Benedict or Melone?" A. "I received a letter from my brother, as I stated here, a few days after that, stating that they had made an assignment and that they had made the banks here preferred creditors. That is the only letter I remember of having received from them for months after that." [Printed record, page 87.]

Continuing, witness said: "How long was that after you wrote the letter on the night of the 15th of February, 1882?" A. "Well, my recollection is it was five or six days." [The Jackson

Circuit Court made the order to sell the stock and goods February 21, 1882—Printed record, page 210.]

"What did you do after you had been informed that the banks of Kansas City had been preferred?" A. "I didn't do anything; I said nothing further about it."

"You made no reply to that letter to Mr. Melone, did you?" A. "I think not."

"Mr. Melone, then your brother informed you in that letter that the banks here had been preferred by the assignment? A. That was my understanding of it, yes, sir."

Richard A. Melone, speaking on the same subject [printed record, page 112] said:

"If you advised them of this preference being given to the banks, don't you think you must have advised them as to the manner in which it was made—that it was by a deed of trust on the property?" A. "Well, I may have done so; I do not know that I did, sir; I may have told them simply this about the matter, that we had made an assignment or whatever you might call it, and perhaps more than likely I did call it an assignment; I don't know whether I did or not; I say I may have done so or I may have said it was something else, *but I told them we had preferred the banks here* and probably gave them some reason why we did do it, etc., etc.,"

James B. Melone did not know that what is called a deed of trust had been made. He could

not assent to it or dissent from it. He knew that the Kansas City banks had been preferred. He knew these banks were to get their debts in preference to other creditors. To this preference he neither assents nor dissents. All this is before Stewart paid the money to the respondent banks. He takes no steps to arrest the course of things and the money is collected by Stewart, and these bank debts are paid according to the preference made and intended and of which he had knowledge. These are payments of debts admitted to be valid, honest, *bona fide* debts. Now how, after such payments, is James B. Melone, the partner, to wrest from those banks the money so paid? The firm creditors stand in no better place, for their rights are derivative from his rights; creditors can be substituted to his rights only; they have no right of their own.

Is this deed of trust void by reason of the want of the assent of James B. Melone to its execution? It was an extraordinary case presented to Richard A. Melone and Charles H. Benedict. The Macon Savings Bank had failed for a very large amount. James B. Melone was its president. By statute law he might be liable for all the debts of the bank. By the law of the State, any creditor of the Macon Savings Bank might have sued James B. Melone by attachment, and might have taken the whole stock into his custoday and sold it. [*Wiles vs. Maddox*, 26 Mo., 77 *et seq.*] Stewart was an experienced man in the grocery trade. All

the partners desired him to manage the business; he was selected as manager; he was appointed receiver. Creditors and all others admit his eminent fitness for the place. Chief Justice MARSHALL says, with reason, that "in extraordinary cases, an extraordinary use of power must be made." James B. Melone expected the partnership business to close. He can not now say the deed of trust is void, because made without his assent, for the reason that it stops the partnership business. James B. Melone expected the partnership business to stop. He expected that and assented to it. The firm creditors can claim no greater right, for their right is derived from the partner's right. This deed of trust is not void for the want of the assent of James B. Melone to its execution.

The second point in the certificate of division in opinion is as follows [page 73, printed record]:

"As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partship under Section 354 of the Revised Statutes of Missouri of 1879?"

Section 354 Rev. Statutes of Mo. of 1879, Vol. 1, page 54, is as follows:

"Every voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the

assignor in proportion to their respective claims, and every such assignment shall be proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed."

This is a transcript of a similar section in Rev. Statutes of 1865, page 452, Section 1.

This section, in the revision of 1865, is adopted with some change from an act approved February 13, 1864. [Note Session Acts of 1863–4 of Mo., page 6, Section 8, near bottom of page 6.]

This act amends the Revised Statutes of 1855:

SECTION 8. "Every assignment hereafter made in this State under the provisions of the act to which this is amendatory, shall be for the benefit of all creditors who shall present and prove up their claims under the provisions of said act; and all debts and liabilities so proved and allowed shall be paid *pro rata* from the assets thereof."

Revised Statutes of Mo. of 1855, Vol. 1, page 202–3, Section 1, is as follows:

SECTION 1. "In all cases in which any person shall make a voluntary assignment of his lands, tenements, goods, chattels, effects, and credits, or any part thereof, to any person in trust for his creditor, or any of them, it shall be the duty of the assignee," etc., etc.

This is enough to show that an assignment may be of all the property or part of it. It may be for all the creditors or some portion of them.

Rev. Stat. of 1855, page 210, Section 39:

SECTION 39. "Every provision in any assignment hereafter made in this State providing for the payment of one debt or liability in preference to another, shall be void; and all debts and liabilities within the provisions of the assignment shall be paid *pro rata* from the effects assigned."

This act is approved December 7, 1855. This is the first time this section appears in Missouri law. It is not in Rev. Statutes of 1845. [See Chapter 10, Rev. Statutes of Mo., 1845, pages 127 to 132 inclusive.]

In 1885 the general law is changed so as to provide that judgments, confessed within thirty days before assignment, shall be paid *pro rata* with all other creditors. [Laws of Missouri, 1885, page 30.]

There is no statute law in Missouri requiring a debtor, under any circumstances, to make a voluntary assignment for the benefit of his creditors. In Missouri we have no bankrupt or insolvent law. In Missouri we have no statute law declaring that any mortgage or deed of trust, or other transfer or conveyance, of personal or real property, shall, under any circumstances, be deemed or held or adjudged to be a voluntary assignment for the benefit of all creditors. The statute law of Missouri has always recognized the validity of mortgages and deeds of trust of personal property.

Revised Statutes 1879, Section 3815, is as follows:

SECTION 3815. "Instruments in writing, conveying chattels or personal property alone, which by any law of this State are required to be recorded or admitted of record in any recorder's office in this State, shall be recorded in a series of volumes separate from those used for recording conveyances of real estate."

SECTION 2503. "No mortgage or deed of trust of personal property hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or or trustee, or *cestui que* trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded."

The deed of trust of personal property not acknowledged and recorded, or where possession is not delivered, is invalid except between the parties thereto. It is not intended to make such deed of trust enure as a voluntary assignment.

SECTION 2496. "Every deed of gift of goods and chattels, in trust to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors existing, and subsequent purchasers."

It don't enure as a voluntary assignment.

SECTION 2497. "Every conveyance or assignment in writing or otherwise of any estate or interest in lands or in goods and chattels or in things in action, or of any rents and profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, writ, judgment, decree or execution made or contrived with the intent to hinder, delay or defraud creditors of their lawful actions, damages, forfeitures, debts or demands, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity issuing out of them, shall be from henceforth deemed and taken, as against such creditors and purchasers prior and subsequent, to be clearly and utterly void."

Such a transfer does not enure as a voluntary assignment.

Again by our Attachment Law, Revised Statutes, 1879, Section 398, debtors are subject to have their property attached for various causes, such as removing the property out of the State, selling or disposing of it fraudulently, so as to defraud, hinder or delay their creditors. But, we have no statute law declaring that such transfers shall enure as voluntary assignments for the benefit of creditors.

SECTION 2505. "Every sale made by a vender of goods and chattels in his possession or under his control, unless the same be accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and be followed by an

actual and continued change of the possession of the things sold, shall be held to be fraudulent, and void as against the creditors of the vendor," etc. The balance of the sections nullifies all conditions in the sale, unless written, acknowledged and recorded.

The statute does not require such transfers to enure as voluntary assignments for the benefit of all creditors.

Section 39 in the Act of 1855, has been before the Supreme Court of Missouri, first in *Shapleigh vs. Baird*, 26 Mo., 322. The facts were these: Shapleigh and Rue recovered judgment against Brent in the Circuit Court of Cooper County, Missouri; on this judgment execution issued and Wm. E. Baird was summoned as garnishee. To interrogatories Baird answered, he had no property, etc. Shapleigh replied, he had property assigned to him setting out an assignment.

The deed here is not a mortgage or deed of trust; it is an assignment. It assigned certain property to pay certain creditors named. It was contended that this deed of assignment was void. Two instructions were given by the court below. They are as follows, on pages 322–3 (If the assignment was void, the assignee was liable as garnishee. Lee *et al. vs. Tabor et al.*, 8 Mo. 322, *et seq.*):

1. "If the deed of assignment made by H. G. Brent on the day of , 1857, to Wm. E. Baird as trustee, referred to in the pleadings and set forth in the agreed facts, did in its provisions

prefer the payment of certain debts then due certain persons by said Brent, in exclusion of the indebtedness due the plaintiffs (Shapleigh and Rue) and for which judgment was rendered against said Brent at the March term of this court, 1857, then the said assignment made by said Brent is void as to said plaintiffs, and judgment will be rendered in their favor against the garnishee.

2. "If the Court find from the evidence and the facts, agreed by the parties, that at the time of the making of the assignment set forth in the agreed facts, H. G. Brent was justly and legally indebted to Shapleigh and Rue (the plaintiffs in the execution) in the sum of $——, and that no provision was made in said assignment for the payment of said indebtedness or any portion thereof, then, although said assignment may have provided for the payment of the *bona fide* debts of said Brent, yet the same is void as to the plaintiffs, and the assets of said assignment in the garnishee's hands are subject to garnishment, and the Court must find for the plaintiffs in the execution."

These instructions were given. Judgment was rendered for plaintiffs in the execution. The case was appealed. The giving of these instructions were assigned for error.

(Under Section 3655, Revised Statutes of Mo. for 1879, it is proper to ask instructions in a case at law where a jury trial has been waived, and we can predicate error on such giving or refusal of instructions, the same as if a jury trial had not been

waived. This section has always been in our statute law. This is our usual practice and is our local law.)

This case involves a construction of Section 39 in the Assignment Law of 1855, heretofore quoted. The Court below held the assignment void and allowed the execution creditor to take the property. It is decided in part under this Section 39: "The judgment of the Circuit Court must be reversed upon any construction of this section. It was certainly not designed to annul the deed of assignment where it was in other respects valid. The Circuit Court in effect held the deed void and permitted a creditor outside of the deed to levy his execution upon the property assigned. All the judges concur in reversing the judgment. Judge RICHARDSON declines giving any opinion upon the proper construction of the 39th section. The cause will be remanded."

Here the contention was that the assignment was void, and that the creditor could disregard it and take the property under execution. The Court holds that he cannot take the property under execution. The statute did not make the assignment void. The balance of the decision is largely *obiter dictum.*

The next case is *Bryan vs. Brisbin*, 26 Mo., 425. Here a citizen of Missouri attached certain property. It had been assigned in Minn; there were preferences. Our Court here refused to enforce the assignment. The Court observes:

"Under such an assignment here the title would pass, but the provisions for preferences would be totally disregarded." [Page 425.]

These are cases where the paper was assumed to be a voluntary assignment. They were not deeds of trust or mortgages.

The next case is that of *Manny vs. Logan*, 31 Mo., 93. The deed is an assignment. It provides for certain named creditors; it provides that these creditors shall be paid in full. The deed then contains this provision: "When all said debts are paid in full, then hold the residue for the benefit of all my creditors, to be apportioned *pro rata* among them by the said trustee, and the remainder, if any, shall be paid to the party of the first part." The creditors not named applied to the Court to have the assets distributed *pro rata* among all the creditors. The assigned effects were not sufficient to pay the preferred creditors. The Court below ordered all the assets to be distributed *pro rata*. The Supreme Court reversed the judgment. *These are preferences in the deed itself.* The assignor was hopelessly insolvent.

The Court say: "We do not consider that the clause in the assignment providing that after the satisfaction of the preferred debts, the residue shall be distributed *pro rata* amongst the other creditors can be termed a provision for them in the sense in which that word is used in the case to which reference has been made. If the debtor still has the right to prefer some creditors to others, making no

discrimination among those preferred, the debtor would be misled and deceived by giving to a clause which merely disposed of a residue, which might or might not happen to the use of the unpreferred creditors the effect of converting the assignment into one for the benefit of all creditors. Such a provision may be inserted with a view to prevent the question arising whether or not the assignment is fraudulent as a mere matter of precaution. Cases have occurred in which it was litigated whether a provision in a deed of assignment for some of the creditors, requiring that the residue, after satisfying the preferred debts, should be paid to the debtor, did not avoid the deed for fraud as containing a a reservation of use for the grantor. The property conveyed fell far short of satisfying the preferred debts, and to hold that a clause which provided for a contingency which did not and could not happen (should be construed) into a provision for creditors would make the case of *Shapleigh vs. Baird* a snare to the debtor who felt himself under a moral obligation to give a preference to some of his creditors. There are but few deeds giving a preference to some creditors which do not, from prudential motives, contain a provision similar to that found in the deed under consideration."

The Supreme Court of the State hold such assignments not for the use of the assignor without any question about it. [*Richards vs. Levin*, 16 Mo., 598-9; *Bigelow vs. Stringer*, 40 Mo., 208.] And Judge KREKEL, of our U. S. Circuit Court,

holds the opposite, as reported in 17 Federal Reporter, page 72. "That a creditor in failing circumstances may lawfully prefer one or more of his creditors and pay the debts due to them in full while other creditors are left unpaid, does not now require the citation of authorities to establish." [*Richards vs. Levin*, 16 Mo., at page 599, top of page.]

Now the question certified here is, whether this deed of trust shall enure as a voluntary assignment. [Printed record, page 73.] The form of the certificate admits that the paper is a deed of trust. This was admitted below, and will, we presume, be admitted here.

Is this deed of trust a voluntary assignment?

By general law the paper on the face of it is a deed of trust in the nature of a mortgage. It conveys the property to the trustee, and then provides that if Benedict, Melone & Co. shall pay the debts to respondent banks, then the deed shall be void. "But if the said Benedict, Melone & Co. shall fail or make default in the payment of such indebtedness to said these above mentioned banks, or any part thereof, when the same shall have become past due and payable for five days, then it shall be lawful for said party of the second part to sell said property in any manner he shall think fit, and out of the proceeds arising from said sale pay off said indebtedness, or so much thereof as shall be unpaid, together with the costs and expenses of said sale; and the overplus, if any there be, shall be paid to

said parties of the first part. Said party of the second part shall take immediate possession of said property." [Printed record, page 72.]

Does this deed of trust operate as a voluntary assignment for the benefit of creditors under Section 354, Revised Statutes of Missouri of 1879? We have quoted the statute before in this brief.

If this deed of trust be a voluntary assignment for the benefit of creditors, it must be such, 1st, Under the general common law of the country, or 2d, By virtue of some statute.

The form of this certificate of division in opinion assumes that the paper is a deed of trust to secure the payment of debts. Under the general common law, a debtor in failing circumstances may prefer one creditor to the exclusion of other creditors.

In *Brothers vs. West*, 7 Peters, 614, MARSHALL, Chief Justice, rendering the opinion of the Court, said:

"But in the United States, where no Bankrupt Law exists for setting aside a deed honestly made for transferring the whole of a debtor's estate for the payment of his debts, the preference given in this deed to favored creditors, though liable to abuse and, perhaps, to serious objections, is the exercise of a power resulting from the ownership of property which the law has not yet restrained. It cannot be treated as a fraud."

GAMBLE, Judge, in rendering the opinion of the Supreme Court of Missouri, in case of *Richards vs.*

Levin, 16 Mo., at pages 596 *et seq.*, on page 599, says:

"That a debtor in failing circumstances may lawfully prefer one or more of his creditors and pay the debts due to them in full while other creditors are left unpaid, does not now require the citation of authorities to establish."

Judge NAPTON, in rendering the opinion of the Supreme Court of Mo., in *Shapleigh vs. Baird*, 26 Mo., page 322 *et seq.*, at page 326:

"Indeed, if the Legislature wish to strike at the root of the evil, they must go back to an old principle of common law, which permits a debtor to prefer one creditor to another, and which privilege can be effected in a variety of modes other than those referred to in our statutes concerning assignments."

It is here spoken of as an "ancient principle" of the general common law. A course of decision by the United States Circuit Court for Missouri, has been made on the construction of this Section 354 of our Revised Statutes. The first of these cases is that of *Martin vs. Houseman*, 14 Federal Reporter, page 160 *et seq.* [The paper is copied on pages 160–1.] There is no express condition that if the debt be paid, the deed is to be void. These words are in this deed, after reciting certain debts: "Now, to secure the payment of said indebtedness to said Anheuser-Buesch Brewing Company and to the said Bank of Kansas City this deed is made."

It provided that the trustee should take possession at once and should proceed to sell.

In rendering the opinion of the Court, KREKEL, Judge, says [page 166]:

"Looking at the character of the instrument under consideration, and applying to it the distinctions made in instruments of that class by the authorities, it would seem that it must be declared an assignment within the laws of Missouri. The seeming incongruity of allowing preferences, and expounding instruments making them so as to defeat their object, is the result of legislation. At common law, as already stated, a debtor could prefer one or more creditors, in whole or in part. The Legislature of Missouri, in the Act of 1855, limited that right, and according to the construction given to that act by the Supreme Court of the State, provided that among those preferred there should be no difference. When the inconsistency of thus discriminating between creditors was pointed out by Judge NAPTON in 1858, the law was amended in 1864 by a new section, providing that every assignment in trust for creditors shall be for the benefit of all the creditors of the assignor. *Was this intended to prohibit a failing debtor from giving preferences at all?* I am inclined to think so, but distinguish between a debtor who, though insolvent, yet hopes to tide over his financial difficulties by securing some of his creditors while others go unsecured. The instruments by which debts are thus secured do not fall within the provisions of the As-

signment Law, while *such as dispose of the whole of the business and property of the assignor, thereby declaring insolvency, are held to fall within its provisions. A careful examination of the long line of Missouri decisions*, has led to the conclusion arrived at. This conclusion is also in keeping with the authorities of many of the States, and especially *in line* with *Federal legislation* and the decision of its courts thereon. To reiterate: A debtor in Missouri under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them, but he cannot do it by an instrument conveying the whole of his property to pay one or more of his creditors. Instruments of the latter class will be construed as falling within the Assignment Laws and as for the benefit of all the creditors, whether named in the instrument or not."

The Circuit Judge McCRARY concurs. The conclusion arrived at very evidently is that this statute was intended to prohibit all preferences by failing debtors. The distinction is one that can't be made or followed in the practical affairs of life.

Six months afterwards the same judge renders another opinion on the same subject—*Kellogg vs. Richardson*, 19 Fed. Reporter, 70 *et seq.*, at page 72. After quoting the statute, the judge says: "Under this provision of law, a merchant may give a mortgage or deed of trust on part or all of his property to secure one or more of his creditors, thus preferring them, but he cannot convey the whole of his

property to one or more creditors and stop doing business. Such turning over and virtually declaring insolvency brings the instrument or act by which it is done within the Assignment Law of Missouri, *which requires a distribution of the property of the failing debtor for the benefit of all the creditors in proportion to their respective demands.* Such is the declared policy of the law; it places all creditors upon an equal footing."

Here was an attack on a deed of trust by attachment in the federal court. It contained a statement that after the debt was paid, the surplus should be paid to the grantor. Of course this ruling here is contrary to the law of Missouri. [*Richards vs. Levin*, 16 Mo., 596, *et seq.*; *Bigelow vs. Stringer*, 40 Mo., 208; *Johnson vs. McAlister*, 30 Mo., 330–1.]

The Court, continuing, says [page 72]:

"The law further is, that no debtor in failing circumstances and unable to pay all his debts, can convey his property in trust and reserve to himself any benefit."

Here was a deed of trust by a "debtor in failing circumstances and unable to pay all his debts," but in place of holding the deed of trust an assignment for all the creditors, one creditor alone attaches and takes his debt in full, leaving others unpaid.

If this deed of trust by this "debtor in failing circumstances and unable to pay all his debts" be in fact and in law a voluntary assignment for the

benefit of all his creditors, then this Court will likely be at a loss to know how the reservation of the surplus to the grantor (after all debts are paid) is a fraud.

The same judge says: "In this case, Richardson made a general assignment afterward, thereby showing that in his view, at least, there was an overplus."

But the assignment and deed of trust were not taken together as one instrument but the attaching creditor took the whole of the property from the assignee and from the trustee in the deed of trust to pay his own debt in full.

This decision was rendered at the April term, 1883.

Dahlman vs. Jacobs was decided March 29th, 1883, reported in Federal Reporter, Vol. 15, at page 863.

This was decided by Judge TREAT at St. Louis. The points were:

First—Whether a creditor at large can maintain the bill either to set aside defendant's conveyance or to decree that it shall stand for a general assignment for the benefit of all the creditors, and if the plaintiff has the proper standing, whether the conveyance in question falls within the provisions of the Missouri Statute as to assignments."

The counsel have exercised extraordinary diligence in presenting and collating cases on the second point. The questions on that point, if they had to be considered, would involve a review of the

many decisions cited, especially those of the Supreme Court of Missouri on the Missouri Statute."

But the point in the case at bar is not touched on or decided.

Judge McCrary concurs.

The next case is that of *Kerbs vs. Ewing*, decided by Judge McCrary in 1884:

"This case is not different in principle from the case of *Martin vs. Houseman*, 14 Fed. Rep., 160. It is true that in the case of *Martin vs. Houseman* the technical deed of trust, which was construed to be an assignment for the benefit of creditors, was defective as a deed of trust in having no defeasance clause attached thereto. *In this case the instrument is a deed of trust in proper form.* This, however, can make no difference. No matter what the form of the instrument where a debtor being insolvent conveys all his property to a third party to pay one or more creditors, to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of all the creditors; the preference being in controvention of the Assignment Law of this State."

Judge Krekel concurs.

This is the whole opinion.

We next have the cases of *Clapp vs. Dittmon* and *Perry vs. Cosby*, 21 Feb. Rep., page 15, *et seq.*, decided by Judge Brewer July 25, 1884.

Both cases were argued together and both involved the same questions. Judge Brewer, in rendering the opinion, said:

"In them are presented three questions:

"*First*—Where a debtor, who is insolvent, transfers all his property to a single party and under such circumstances that it is obvious there was no intention of merely giving security, and with the idea of paying and re-claiming the property, must such transfer, no matter by what form of instrument, whether that of a chattel mortgage or otherwise, and whether made to the creditor directly or to a trustee, be treated as a general assignment and for the benefit of all the creditors? This question was fully considered by this Court in the case of *Martin vs. Houseman*, 14 Fed. Rep., 160, and after a full examination of the Statutes of Missouri and the decisions of its Supreme Court, it was answered in the affirmative. The opinion in that case was written by Judge KREKEL, and was concurred in by my predecessor, Judge MCCRARY. That opinion was followed in *Dahlman vs. Jacobs*, 15 Fed., 863," [the point was not touched or decided.—ESS.] "in *Kellogg vs. Richardson*, an unreported case in the Western District, and also I am informed in other cases in this Court, as well as in some of the District Courts of the State. While if this was a new question I confess my own conclusions would be different, and in harmony with the decisions of *Nat. Bank vs. Sprague*, 20 N. J. Eq., 28; *Farwell vs. Harvard*, 26 Iowa, 381; *Doremus vs. O'Harra*, 1 Ohio St., 45; *Atkinson vs. Tomlinson*, *id.*, 241, and other cases cited by counsel for defendants, yet I think there has been such a course of decision in

this circuit as to establish the rule in the United States Courts for this State in accordance with the opinion in *Martin vs. Houseman*, *supra*, and until there be some authoritative construction of the statute by the Supreme Court of the United States, or of the State, I shall follow the rule laid down as above."

A motion for a re-hearing was filed.

The opinion was rendered orally by BREWER, Circuit Judge. It is reported in *Perry vs. Cosby*, 21 Fed. Reporter, p. 737.

After stating that the matter was heard before a full bench, the oral decision, as reported, continues:

"That question is, whether a conveyance which is not in terms and according to the old technical definition a 'voluntary assignment for the benefit of creditors,' and yet which is, in fact, a conveyance of the entire property of the insolvent to one creditor, is within the purview of that statute of Missouri which provides that every voluntary assignment for the benefit of creditors shall enure to the benefit of all creditors. My own views were expressed in the opinion that I filed, and yet in the decision I followed the ruling which had been laid down by my predecessor in office," [It is here said that Justice MILLER concurs in holding with MCCRARY, Judge] "that such a transfer, although there is technically no assignee, so long as it is made of the entire property of the insolvent and is not a mere giving of security by way of mortgage, contemplating payment by the mortgagor in the future,

and the retention of possession by him, comes within the scope of the statute and is to be treated as an assignment, and enures to the benefit of all creditors."

The motion for re-hearing is overruled.

The next case is reported as *Clapp vs. Nordmeyer*, decided October 1, 1885, reported in 27 Fed. Rep., page 71. The case referred to as decided is the one at bar.

"As will be seen, this brings the cases very clearly within the principle of the cases of *Clapp vs. Dittman* and *Perry vs. Cosby*, decided a few months ago. In those cases I felt constrained to follow the ruling laid down by my predecessor, at the same time saying that I did not believe that the ruling was right. The question was subsequently presented to Mr. Justice MILLER, presiding justice of this circuit, and he agreed with my predecessor. Of course that settles the law in this circuit, so far as this court is concerned, until either the Supreme Court of the State or the Supreme Court of the United States rule differently, and I am happy to say that in the Western District of this State a case was decided at the spring term involving this question which was taken to the Supreme Court for its ruling. The principle laid down in the cases referred to was that where a debtor, being insolvent, by an instrument disposes of all his property, such instrument must be treated as tantamount to a voluntary assignment for the benefit of his creditors, and all share alike in the proceeds of the prop-

erty conveyed. As I said then, and say now, I do not believe this is a right construction of the Statutes of this State. Our Supreme Court has held that a debtor may prefer one creditor to another. That right existed at common law. It is a part of the '*jus disponendi*' that follows from the ownership of property, and except as expressly limited by statute ought always to be recognized. I don't think the Legislature of this State has attempted to restrict that right except in what are technically voluntary assignments."

In *Elgin Nat. Watch Co. vs. Meyer et al.*, reported in 30 Fed. Rep., at page 659, Judge BREWER says, speaking on the point in controversy here:

"That line of decision has been followed since I have been on the bench, by myself under protest, not believing it to be a true construction of the Missouri Statutes; but I have hitherto been alone in that view, so far as the various federal judges in this State are concerned. I am glad to say, however, that I have one with me now who thinks as I do as to the proper construction of the statute."

This is the opinion of Judge THAYER, as reported in this case. Judge TREAT gives an excuse for what he evidently don't like, in *Freund vs. Jaegerman*, 26 Fed. Rep., page 812 *et seq.* Judge THAYER evidently does not agree with this line of decision, as we may know from the reported case decided by Judge BREWER alone, and by his opinion in *Weil vs. Polack*, 30 Fed. Rep., 813 *et seq.* *Dahlman vs. Jacobs*, referred to heretofore, was tried a second

time and reported in 16 Fed. Rep., at pages 614–5:

"The question presented by the demurrer to the bill would, if reviewed at length, require an elaborate analysis of the many conflicting statutes cited and decisions thereunder, involving an attempt to reconcile diverse opinions upon the general subject. The case now before the Court, however, arises under the Missouri Statutes which have been fully interpreted, not only by the Missouri Supreme Court, but also by the United States Circuit Court at Jefferson City last October. That decision is conclusive." [A note refers to *Martin vs. Houseman*, decided, not at Jefferson City, but at Kansas City.]

In *Smith & Keating Implement Co. vs. Thurman*, in 29 Missouri Appeals Rep., at 189 *et seq.*, the deed of trust copied from the bill of exceptions is as follows:

"TRUST DEED.

"This indenture, made and entered into this 5th day of October, 1885, by and between John A. Thurman, of the County of Dade, State of Missouri, party of the first part; J. L. Wetzel, of the County of Dade, State of Missouri, party of the second part, and John Daughtrey, Hannah McMillan, B. G. Thurman, J. B. Thurman, J. A. Picotte, A. Fox, J. M. Daughtrey and John S. McConnell, of the County of Dade, State of Missouri, parties of the third part;

"WITNESSETH: That the said party of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the sum of one dollar to him paid by the said party of the second part (the receipt of which is hereby acknowledged) do by these presents grant,

bargain and sell, convey and confirm unto the said party of the second part, the following described real estate and personal property, situate, lying and being in the County of Dade, and State of Missouri, to-wit:

"The east half of lot three (3), in block seven (7), in the Town, now City, of Greenfield, subject to mortgage given to A. Fox. Also lot three (3), block four (4), and north half of lot eight (8), block two (2), and west half lot thirteen (13), block seven (7), and west half of the east half of lot thirteen (13), block seven (7), in the Town of Corry, and lot eight (8), block eighteen, (18), Walker & Blackmore's Addition to the Town of Corry. Also the following land in Jasper County, Missouri, to-wit: Northwest quarter of the southeast quarter and the north half of lot number one of the southwest quarter of section two (2), township twenty-seven (27), range thirty-four (34), subject to a mortgage to John R. Tarrant, for $1,400. Also a general stock of merchandise, consisting of dry goods, boots and shoes, hats and caps, groceries, notions, store furniture and fixtures and all other articles of whatever name, known and designated in the store house now occupied by the said party of the first part, known as the Hayden Building, on north side of the public square, in the City of Greenfield, and also all notes, accounts, evidences of debt of whatsoever kind, or description, now due or owing to the said party of the first part, and not heretofore transferred for the purpose of payment of debts, and also iron fellow and one Bain wagon.

"To have and to hold the same with the appurtenances, to the party of the second part, and to his successor or successors in this trust, and to him their grantees and assigns forever. In trust, however, for the following purposes:

"Whereas, John A. Thurman, the said party of the first part, has heretofore, as well as this day, made, executed, and delivered to the said parties of the third part, his promissory notes, by which he promised to pay to the

said parties of the third part, for value received, the sums and amounts as set forth in the several notes hereinafter described, to-wit: To John Daughtrey, one note dated May 26, 1879, for $400 with 10 per cent interest from May 26, 1882; one note dated May 26, 1879, for $163.84, with balance due of $135, with 10 per cent compound interest thereon until paid; one not dated May 26, 1879, for $575, with interest at 10 per cent per annum from May 26, 1882. To J. B. Thurman, one note dated October 5, 1885, for $100, with interest at 10 per cent. To Hannah McMillan, one note for $225 dated ———, with 10 per cent interest from date. One note to B. G. Thurman, dated December 26, 1883, for $209.15, credited as follows: December 30, 1884, $130, with 10 per cent interest from date. To J. A. Picotte, one note dated August 2, 1880, for $200, now due $212, with interest at 10 per cent. To James Daughtrey, one note dated December 1, 1882, for $400, now due $260; one note dated February 29, 1884, for $225, now due $101. To A. Fox, one note for $500, dated March 24, 1882, with 10 per cent interest, and one note for $200, dated June 1, 1883, with 10 per cent interest, with credit of $40 to be entered on last described note. To John S. McConnell, one note for $100, with 10 per cent interest from May 10, 1885, dated May 10, 1885. All of said notes signed by John A. Thurman, and said note to said John Daughtrey for $400, also signed by J. B. Thurman as security, and said note to John Daughtrey for $575, also signed by Jesse Daughtrey as security.

"This conveyance is made for the purpose of securing the payment of said debt, with the interest thereon, as speedily as the property herein described and conveyed can be cashed for that purpose without sacrifice, and it is specially understood and agreed that said debts be paid in the order in which they are hereinbefore described, after the payment of the costs of executing this trust as hereinafter specified for the purpose of executing this trust. It is hereby agreed that said trustee, and

he is hereby authorized to immediately take possession of all of said property herein described, and upon taking possession of the same, he shall proceed to sell said stock of merchandise, furniture and store fixtures at retail, at such prices as in his judgment the same ought to be sold for at retail, in said City of Greenfield; that he shall have the right to sell all of said stock of merchandise, store fixtures and furniture in bulk, at not less than the original cost price (except by the written assent of said party of the first part, and a majority of the said parties of the third part, and then only at such prices as may be specified in said written assent).

"That he shall forthwith proceed to collect all notes, accounts and debts of every nature hereby conveyed to him, and for that purpose he may employ counsel and bring suits in his own name, and do all things that he may deem necessary to secure a speedy collection and settlement of such debts as fully as might be done by said party of first part, before the execution of this deed. That he shall sell the real estate herein conveyed at public auction, at the east door of the court house in the said City of Greenfield, after having given notice of such sale by publication made in one of the papers published in said Dade County, at least fifteen days before such day of sale, to the highest bidder, for cash in hand, and shall execute deeds to the purchasers of the same, which shall be received as *prima facie* evidence of all facts therein recited, and such deeds shall be received and have the same force and effect as if executed by said party of the first part. That said trustee shall keep a true and perfect itemized account of all articles sold and the price received for the same, which shall be open to the inspection of all parties interested therein; that at the end of each week the amount received on sales shall be deposited in the Dade Connty Bank subject to the order of the person to whose debt the same should be applied, as hereinbefore set forth, after deducting the compensation to said trustee for his services, which

shall not exceed the rate of thirty dollars per month, and such other expenses as he is hereinafter authorized to incur. That the said trustee shall be authorized to employ such clerical help as in his judgment may be necessary, and also make such publications, advertisements and notices of said property so held by him for sale, as may be deemed necessary to secure a speedy sale of the same, and he is also authorized to employ such legal counsel as may by him be deemed necessary in carrying out and executing this trust.

"Now, if the said party of the first part shall well and truly pay off and discharge said debts in full according to the tenor and effects of said notes, at any time before any or all of said property herein conveyed shall have been disposed of by said trustee, then, as to said property or the residue thereof, this conveyance shall be void and full satisfaction of the same be entered by said trustee. That after the payment of such debts and the expenses of this trust, if made by the sale of said property as hereinbefore provided for, or any part thereof, the residue, whether in property or money, shall by said trustee be turned over to said party of the first part, his assigns or legal representatives; and the said party of the second part covenants faithfully to perform and fulfill the trust herein created, not being liable or responsible for any mischance occasioned by others.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"J. A. THURMAN. [SEAL]
"J. L. WETZEL [SEAL]

"STATE OF MISSOURI, }
"County of Dade. } ss.

"On this 5th day of October, 1885, before me personally appeared John A. Thurman, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed. And the said John A. Thur-

man further declares himself to be single and unmarried.

"In testimony whereof, I have hereunto set my hand and affixed my official at my office in Greenfield, Mo., the day and year first above written.

"My commission expires June 6, 1889.

"WILL R. BOWLES,
"[L. S.] Notary Public."

"STATE OF MISSOURI—Sct.

"I, F. C. Farr, clerk of the Kansas City Court of Appeals, certify that the foregoing is a true copy of a deed of trust contained in bill of exception in case of *Smith & Keating Implement Company vs. J. W. Thurman, Garnishee, etc.*, on file in my office.

"Witness my hand and the seal of said court, at office in Kansas City, this 27th day of August, 1888.

"F. C. FARR, Clerk.
"[L. S.] By S. K. Farr, D. C."

Does this deed of trust operate as a voluntary assignment?

In *Crow vs. Beardsley*, 68 Mo., 435 *et seq.*, on pages 437–8, the Supreme Court of Missouri discuss the difference between a voluntary assignment and a deed of trust like this one. The Court [page 438] says:

"The deed in question is, therefore, a deed of trust in the nature of a mortgage."

We refer to the whole case, as reported. Lest there be doubt about the instrument, we copy the deed embraced in that decision. It is as follows:

"DEED OF TRUST.

"This deed, made and entered into this 21st day of April, eighteen hundred and seventy-five, by and be-

tween George Beardsley and Mattie Beardsley, of Audraid County, Missouri, parties of the first part, and W. H. Kennon, of Audrain County, Missouri, party of the second part, and A. C. Hitt, P. M. Morris, Wm. Pollock & Co., P. H. Vance, T. M. Gill & Co., Eugene Jones, Wm. Harper & Co., John S. Jones, Josiah Gant, James E. Sims, H. Reed, Thos. B. Hitt, Wm. Baker and James Pasqueth, of Audrain County, Missouri;

"WITNESSETH: That the said parties of the first part, in consideration of the debt and trust hereinafter mentioned and created, and of the fum of one dollar to them paid by said party of the second part (the receipt of which is hereby acknowledged) do by these presents, grant, Bargain and sell, convey and confirm unto the said party of the second part the following real estate situated in Audrain County, Missouri, to-wit:

"The southwest quarter of the northeast quarter, northwest quarter of the southeast quarter, and the north half of the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter (excepting (26) twenty-six acres lying and being north of the Louisiana and Mo. River Railroad), all in section (9) nine, township (50) fifty, range (10) ten, excepting one acre in which the stone is situated on said tract of land; also the following personal property, to-wit: (1) one pair of chestnut colored mares, (1) one black mare, one bay mare, one Fish Brother wagon and harness, one spring wagon and harness, (22) twenty-two head of cows and heifers now on said Beardsley's farm in Audrain County, Mo., (24) twenty-four head of stock hogs now on said Beardsley's farm in Audrain County, Mo., (2) two breaking plows, to harrows, one corn cultivator, hay and oats in barn of said Beardsley, and stock of general merchandise, consisting of groceries, dry goods, clothing, cutlery, Hardware, crockery, boots and shoes, notions, flour, meal, fixtures, etc., in my storehouse situated on my farm ten miles southwest of Mexico in Audrain County, Missouri, and one account book belonging to

said store, containing accounts on different parties, being in Audrain, Boone and Calloway Counties.

"To have and to hold the same, together with the appurtenances, to the said party of the second part, and to his legal representavies forever; in trust, however, for the following purpose:

"Whereas, the said George Beardsley has this day made and delivered the following notes to the following parties respectively, to-wit: To Jno. S. Jones, one note for $300; to A. C. Hitt, one note for $236.75; P. M. Morris, one note for $80.12; to Wm. Pollock & Co., one note $225; to P. H. Vance, one note $400; to T. M. Gill & Co., one note $278.35; to Eugene Jones, one note for $35; to Wm. Harper & Co., one note $27.90; to James E. Sims, one note $219.05; to Jas. Pasqueth, one note $66.55; to T. B. Hitt, one note $40; to Wm. Baker, one note $270. All of said notes are due and payable five days after date, at the rate of ten per centum per annum compound interest from date till paid; also one made to Joseph Gant, for $200, dated January 8, 1875, due April 1, 1875, and one note to Josiah Gant, dated January 8, 1875, for $274, with a credit of $125 paid on same, about February 15, 1875, both of said notes to bear seven per cent interest from date till paid, and one note to Harvey Reed, dated about the 19th day of March, 1875, due four months from date, with ten per cent interest from date; and

"Whereas, for the purpose of better securing said indebtedness, said George Beardsley covenants and agrees with said parties of the third part, and their assigns, that said property is now free and clear from all general and special taxes; the same has always been and hereafter shall be promptly paid; and in case there should be any taxes now in arrears, or in case there shall be any default in the punctual payment of the same at any time hereafter, said part— of the third part, or their assigns, at their option, may pay same or redeem said property, and all amounts so expended shall become

a debt due, additional to the indebtedness aforesaid, and secured in like manner by this deed of trust.

"Said Beardsley agrees that P. H. Vance shall take possession of said store and the account books thereto belonging, and that the said Vance may take a superintending control of all said personal property conveyed in this deed.

"Now, if said promissory notes shall be punctually paid at maturity, and if the covenant aforesaid shall be well and truly kept, and all amounts expended as aforesaid shall be refunded and paid to the said parties of the third part, or their assigns, by said George Beardsley, or his legal representative, then the property herein before conveyed shall be released at the cost of the said parties of the first part; but if said promissory notes or either of them, shall be allowed to remain due and unpaid, or in case of payment of any amount expended as aforesaid should not be made, or in case said covenant, any part thereof, shall not be fully kept, then this deed shall remain in full force, and the said party of the second part, W. H. Kennon, or in the event of his disability, then the sheriff of Audrain County, Mo., may proceed to sell the property hereinbefore described, or any part thereof, at public vendue, to the highest bidder, at the farm of said George Beardsley, ten miles southwest of Mexico, Mo., for cash, first giving ten days' public notice of the time, terms and place of said sale, and of the property to be sold, by putting up ten printed hand bills in ten public places in Audrain County, Mo., and upon such sale shall execute and deliver a deed or deeds, in fee simple, of the property sold, to the purchaser or purchasers thereof, which shall be *prima facie* evidence of all the recital therein contained, and receive the proceeds of sale, out of which shall be paid, first, the cost and expenses of executing this trust, including compensation to the trustee for his services, and next, whatever may be due on said notes, interest and taxes, and the remainder, if any, shall be paid to the said George Beardsley

or his legal representatives. And the party of the second part covenants faithfully to perform and fulfill the trust herein created.

"In testimony whereof, the parties have hereunto set their hands and seals, the day and year aforesaid.

"GEORGE BEARDSLEY. [SEAL]
"MATTIE BEARDSLEY. [SEAL]

"STATE OF MISSOURI, } ss.
"County of Audrain. }

"Be it remembered, That on this 21st day of April, eighteen hundred and seventy-five, before me, the undersigned, a notary public within and for the county aforesaid, personally came George Beardsley and Mattie Beardsley, his wife, who are to me personally known to be the same persons whose names are subscribed to the foregoing instrument of writing, as parties hereto, and they acknowledged the same to be their act and deed for the purposes therein mentioned; she, the said Mattie Beardsley, having been by me first made acquainted with the contents of said instrument of writing, on an examination apart from her said husband, acknowledged that she executed the same and relinquishes her dower in the real estate therein mentioned and conveyed, freely and without compulsion or undue influence of her husband.

"Witness my hand and seal of office the day and year first aforesaid. Commissioned April 11th, 1874; expires April 11th, 1878.

"JAMES W. DANIEL,
"[L. S.] Notary Public."

"STATE OF MISSOURI, } ss.
"County of Audrain, }

"I, John Gregg, recorder of deeds for said county, do hereby certify that the above and foregoing deed was filed for record in my office on the 21st day of April,

1875, at 3:30 o'clock P. M., and has been duly recorded in Book K, page 365, and following.

"Witness my hand and seal of said office on the day and year aforesaid.

"JOHN GREGG,
"[L. S.] Recorder."

"Endorsed: filed April 21st, 1875, at the hour of 3:30 o'clock P. M., and recorded in Book K, page 365.

"JOHN GREGG, Recorder."

"STATE OF MISSOURI—ss.

"I, Henry W. Ewing, clerk of the Supreme Court Missouri, do hereby certify that the above and foregoing is a true and correct copy of the deed of trust of George and Mattie Beardsley to W. H. Kennon, as the same appears in the record of Crow, McCreary & Co. vs. George Beardsley, W. H. Kennon, interpleader, (being the same case reported in Vol. 68, Mo. Reports, at page 435 and following), now on file in my office, together with the acknowledgment and certificate of filing and recording, as the same is to be found at pages 5 to 11 of said record above mentioned.

"In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri. Done at office in the City of Jefferson this 10th day of April, A. D. 1888.

"HENRY W. EWING, Clerk.
"[SEAL] "By Rowan Ray, D. C.

Here is a deed of trust to secure fifteen different persons. The notes of twelve of these persons are due five days after date, one note was past due twenty days when the deed of trust was made. This is the paper before the Supreme Court of Mo. in *Crow vs. Beardsley*, 68 Mo. The question decided

by the Supreme Court of Missouri is that the above paper is a deed of trust; it is not an assignment. It is true the deed of trust does not in terms say this is all the property Beardsley had; but it implies as much. It conveys land, a pair of mares, a farm wagon and harness, a spring wagon and harness, 22 cows on his farm, 24 head of hogs, 2 breaking plows, 2 harrows, a cultivator, hay and oats in the barn, a whole stock of goods, etc., in a store house and a whole book of accounts on parties in Audrian and Calloway Counties, Mo. It turns the property over to one of the beneficiaries in the deed of trust. The deed of trust is dated April 21, 1875. The attachmeut is issued May 5, 1875. The mortgaged goods are attached, for Kennon interpleaded for them. Just fourteen days after making this deed of trust the goods were attached. If Beardsley had owned other property, it is not likely that a creditor would wantonly provoke a contest over the deed of trust. The inference is reasonable that Beardsley conveyed by this deed of trust all the property he had.

In *Smith & Keating Imp. Co. vs. Thurman*, 29 Mo. Appeals, 186 *et seq.*, the deed of trust has been copied heretofore. The deed of trust does not in terms say this is all the grantor's property. It conveys lands and town lots, and a stock of goods, and all notes, accounts, and evidences of debt "not heretofore transferred for the purpose of payment of debts." The deed of trust is dated October 5, 1885. It secures notes to fifteen differ-

ent parties. Some of these notes were made in 1879, six years before the deed of trust was made; one note was made in 1880; three in 1882. All the notes except one were dated six years, three years, two years, etc., etc., before the deed of trust was made. The trustee was authorized to take immediate possession, and proceed to sell the property, and to collect the debts, notes and accounts. He was to sell the land, make deeds for it and get the money, and the defeasance was that if the grantor paid these debts, at any time before the trustee sold all the property, then as to the residue not sold by the trustee, it should be delivered back to the grantor. The Court decided that this a deed of trust, not a voluntary assignment. This decision is unanimous, the opinion being rendered by the then presiding judge, JOHN F. PHILIPS, now Judge of U. S. District Court for Western District of Missouri.

Kerbs vs. Ewing, quoted heretofore, decides that a deed of trust is a voluntary assignment. Judge BREWER does not concur in such a construction of our Missouri Statute. Judge THAYER, of St. Louis, is evidently opposed in opinion to this line of decisions. Judge PHILIPS does not concur in such line of decisions. The Circuit Justice is, to say the least, in very grave doubts as to the propriety of this course of decision. There is not a federal judge in America, now on the bench, who approves of this line of decisions, beginning with *Martin vs. Houseman.*

"This conclusion is also in keeping with the authorities of many of the States and especially in line with federal legislation and the decisions of its courts therein."

We must admit that this decision is in line with the Bankrupt Law (we suppose the Court means this), but that law was repealed. This conclusion is not in line with the decisions in other States, for their statutes are different, as we shall see hereafter. "The long line of Missouri decisions" referred to, consist of a few cases, not one of them in the least degree intimating that a deed of trust is a voluntary assignment.

But, what is a "voluntary assignment of lands, tenements, goods, chattels, effects and credits, made by debtor to any person in trust for his creditors," within the meaning of this Section 354? The assignor cannot escape personal liability for his debts except by payment. This is the general common law. The State of Missouri has never attempted, by any statute, to change the general common law. If the assignor insert in the deed of assignment a provision for the release from all creditors who take under it, this makes the deed of assignment fraudulent under our decisions. "Our Legislature has not seen fit to enact any law by which the debtor can escape his liabilities by giving up his property." [*Brown vs. Knox*, 6 Mo., page 302, at page 314.]

A voluntary assignment, exacting releases, is fraudulent as to creditors.

See also:

Jeffries vs. Bleckman, 86 Mo., at page 356.
Drake vs. Rogers, 6 Mo., 317 *et seq.*

How does this deed of trust, or chattel mortgage, become a voluntary assignment of goods, chattels and effects by these debtors in trust for their creditors? If we look at the intent of the parties as shown on the face of the paper, we know it is not intended to be such voluntary assignment.

Section 354 of the Revised Statutes of Missouri does not define or attempt to define what shall be deemed to be a "voluntary assignment by debtor in trust for his creditors." That is left to the general common law or to some other statute. The certificate of division does not proceed on the theory that the parties intended to make a voluntary assignment, but by mistake or accident made a deed of trust. In this section (354) the words, "lands, tenements, goods, chattels, effects and credits," are to be taken separately. The statute means that "every voluntary assignments of lands made by a debtor to any person in trust for his creditors, shall be for the benefit of all his creditors." It is not necessary that the deed should embrace "tenements, goods, chattels, effects and credits" in addition. The statute means that "every voluntary assignment of goods and chattels made by a debtor to any person in trust for his creditors, shall be for the benefit of all his creditors." If any other construction be adopted, then the deed of trust in con-

troversy, even if it be a voluntary assignment, is not within the section, for it does not import to convey, nor is it claimed to convey any "lands" or "tenements."

The statute in question (Section 354) does not provide that the voluntary assignment shall be of all the lands, and all the tenements, all the goods, all the chattels, all the effects, and all the credits of the assignor.

The voluntary assignment of "goods and chattels" is within this statute, and whether the deed embraces part of the goods and chattels, or all of them, can make no possible difference.

By the general common law, a debtor may make a voluntary assignment of part of his property in trust for his creditors. We have no statute in Missouri changing this rule of the common law.

Section 354 was not intended to change and does not change this rule of the common law. If a debtor make a voluntary assignment of part of his goods and chattels, there is no rule of the general common law of Missouri which will make it embrace all the rest of his property not named in the deed.

Under the general common law, the intention of the parties would control: it could not be extended to include all, when the deed names only a part. The statute law of Missouri has not changed the common law. It is not the design or purpose of Section 354 to declare the rule to be that a voluntary assignment of part of the goods and chattels

of the assignor, shall be deemed to embrace all his goods and chattels as well as all his other property, "lands," "tenements," "effects" and "credits."

Section 2503, Revised Statutes of 1879, reads:

SECTION 2503. "No mortgage or deed of trust of personal property hereafter made, shall be valid against any other person than the parties unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or *cestui que* trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged or proved and recorded."

The mortgage or deed of trust may be made on part or on the whole. The mortgage or deed of trus is valid between the parties without an acknowledgment, without any record, and without any change of possession. It can make no difference whether the mortgage or deed of trust embraces all the grantor's goods and chattels, or only part. The mortgage or deed of trust is equally good between the parties. An acknowledgment and record or delivery of possession can be of use only against two classes of persons: 1st, purchasers; 2nd, creditors. Where possession of the property is delivered to the trustee, as in this case at bar, it is intended by this law to make such mortgages or deeds of trust valid against such creditors. This excludes the idea that such chattel mortgage shall enure in

their favor as a voluntary assignment, because the law makes it valid as a chattel mortgage or deed of trust. This chattel mortgage or deed of trust may embrace all or only part of the mortgagor's personal property. It is not limited by general common law or by statute.

When a "mortgage or deed of trust of personal property" is spoken of in this section, it means that that mortgage or deed of trust may embrace all the personal property or only part. In either case it is equally valid between the parties without any acknowledgment or secord, and if acknowledged and recorded, or if possession be delivered, then it is equally valid as a mortgage or deed of trust as against a creditor, whether it embraces all his personal property or only part.

Pursuant to this statute law, the trustee took immediate possession. The record might be questionable for the reason that the local law requires the mortgage or the deed of trust to be recorded in the County in which the mortgagor resides. Where shall this deed be recorded? James B. Melone resided at Macon City, Macon County, Missouri. The statute, Section 2503, requires the deed of trust or mortgage to be filed for record "in the County in which the mortgagor or grantor resides."

It may be a serious question whether it was not necessary to record this deed of trust in Macon County, Missouri, where the grantor, James B. Melone, resided. Because all parties were in doubt

on this point, the statute was complied with by taking immediate possession.

This Court decided a similar case in *Stewart vs. Platt*, 101 U. S., 735 *et seq.* There is this difference: The law of New York does not seem to provide for a mortgagee or trustee taking immediate possession of the goods mortgaged, while our law does.

In *Stewart vs. Platt*, above, there was a controversy over certain personal property between an assignee in bankruptcy, judgment creditors and the mortgagee.

The mortgage was held valid against the assignee in bankruptcy, invalid against the executions. The execution creditors took the property, their title being better than the mortgagee and better than even an assignee in bankruptcy.

Under the law of Missouri any one may make a mortgage or deed of trust of all or part of his property.

"A debtor may give a preference to a particular creditor or set of creditors by a direct payment or assignment, if he does so in payment of his or their just demands, and not as a mere scheme to secure the property to himself." [*Shelly vs. Booth*, 73 Mo., 74 *et seq.*, at page 77.]

A creditor, by this last decision, may take property from his debtor in payment of his debts even if the creditor knows that the debtor intends thereby to hinder, delay or defraud his creditors. If he may take it absolutely as payment, he may

take it conditionally as security. It is strange that this section (354) was intended "to prohibit a failing debtor from giving preferences at all," as decided in *Martin vs. Houseman*, 14 Fed. Rep., at page 166, yet the preference in *Shelly vs. Booth* was sustained.

Deeds of trust are generally known in Missouri. They have almost entirely superseded mortgages. They are recognized by our statute laws.

Mr. Pomeroy, in his work on Equity Jurisprudence, Section 995, Vol. 2, at page 544, speaking of this form of security, says:

"Indeed, in a majority of the States, this form of security has come into general, and in some instances, universal use."

Where anyone in Missouri gives security on real or personal property there is not one case of mortgage to one hundred cases of deeds of trust.

We submit that the case of *Martin vs. Houseman*, and other cases cited, utterly do away with any value to Section 2503. When the debtor is solvent the creditor don't need a chattel mortgage, and when he is insolvent the chattel mortgage enures as a voluntary assignment, *i. e.*, it is invalid as a chattel mortgage. But it is the evident purpose of this statute to make the chattel mortgage valid against creditors.

Further, the right to make an assignment of property for the benefit of creditors and to make a mortgage or deed of trust on personal property are

rights created by general common law. It is a part of the *jus desponendi* of all property.

In *Halsey vs. Whitney*, 4 Mason, 206 and 210, Judge STORY speaks of assignments as "encouraged by the common law." In Missouri they existed by common law. TheStatute of Missouri only attempts to regulate what existed before without the aid of any statute.

Now, statutes in derogation of the common law are to be strictly construed. Endlich on Interpretation of Statutes at page 174, speaking of this rule, says: "But in this country the rule has assumed the form of a dogma that all statutes in derogation of the common law, or out of the course of the common law, are to be strictly construed."

This Court, in *Shaw vs. Railroad Co.*, 101 U. S. Rep., at page 565, say:

"No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

Chancellor Kent in his Commentaries, Vol. 1 (12th Ed.), * page 464, bottom paging 527, says:

"Statutes are likewise to be construed in reference to the principles of the common law, for it is not to be presumed that the Legislature intended to make any innovation on the common law further than the case absolutely required. This has been the language of the Courts in every age, and when we consider the constant, vehement and exalted eulogy which the ancient sages bestowed upon the

common law as the perfection of reason, and the best birthright and noblest inheritance of the subjects, we cannot be surprised at the great sanction given to this rule of construction."

The general tenor and effect of *Manny vs. Logan*, 31 Mo., 93–4, is to the same effect, for there the deed of assignment provided for the payment of certain creditors, and then contained this clause: "When all said debts are paid in full, then hold the residue for the benefit of all my creditors, to be apportioned *pro rata* among them by the said trustee, and the remainder, if any, shall be paid to the party of the first part."

"The property conveyed fell far short of satisfying the preferred debts, and to hold that a clause for contingencie, which did not and could not happen [should be construed] into a provision for creditors, would make the case of *Shapleigh vs. Baird* a snare to the debtor, who felt himself under a moral obligation to some of his creditors."

The whole case proceeds on the theory of a strict construction of this Section 39 (heretofore quoted) of the Assignment Law of Missouri of 1855.

The Supreme Courts of the different States follow this rule in their construction of statutes, as will be seen in the following cases:

Section 2115 of the Iowa Code is as follows: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid unless it be made

for all his creditors in proportion to the amount of their respective claims."

This is quoted from *Aulman vs. Aulman* and *Guelich vs. same*, both reported Vol. 32, Northwestern Reporter, at page 240 *et seq.* In rendering the opinion of the Court, ROTHROCK, J., says:

"Lorenz Aulman was the active business manager of the firm, and knowing that he could not discharge the liabilities, there was given to certain of the creditors of the firm the following instruments: To the plaintiff, Theodore Aulman, a chattel mortgage upon all the personal property of the grantors, including books of account and notes, and another mortgage to the same party upon certain real estate; one mortgage to Theodore Guelich upon certain real estate; a deed to Lena Ronekono of certain real estate, and an assignment to William Aulman of a certain chattel mortgage held by the partnership against another party. These instruments covered all of the property of the partnership, and all the property of the individual members of the firm which was subject to execution or attachment. The instruments above enumerated were all executed on the 11th day of December, 1885, and filed for record two days afterwards. They were all prepared by the same person and signed at the same time, and the evidence shows quite satisfactorily that they were all parts of a general design to secure the creditors to whom they were given. The defendants contend that these several instruments constituted a general assign-

ment, and were void because they gave preference to certain of the creditors of the partnership."

The Court quote from *Gage vs. Parry*, 29 N. W. Rep. (reported also in 69 Iowa, 605), as follows:

"They had the legal right to pay or secure any one or more of their creditors, and their right in this respect was not at all affected by the fact that they were insolvent. Nor does the fact that the whole of their assets was devolved to the payment or security of but a portion of the debts they were owing, afford any ground of complaint to those creditors whose debts were unsecured."

The Court, after reviewing all Iowa cases, concludes that the transactions do not make a "general assignment of property by an insolvent or in contemplation of insolvency" within the meaning of that statute.

In *Farwell vs. Howard*, 26 Iowa, 381, DILLON, C. J., in rendering the opinion of the Court, on page 384, says:

"The instrument is and purports to be a mortgage and not an assignment, and it is not void as being in contravention of the statute. [Rev. Stat. 1826, Code 1851, Sec. 977.] This statute does not prevent a debtor from mortgaging or selling all of his property to one creditor to secure or pay his debts, if the transaction be honest—free from fraud. The latest decisions of the Court have settled this point, and it is sufficient to refer to them: *Sampson & Powers vs. Arnold*, 19 Iowa, 479; *Fronn vs.*

Jones, 13 Iowa, 474–480; *Hutchinson vs. Watkins*, 17 Iowa, 475."

In *Kohn Bros. vs. Clement*, 58 Iowa, p. 589, at page 593, the Court, after quoting the statute, say:

"The question presented is as to whether the mortgage in question can be held to have been intended as a general assignment. In our opinion it cannot. The word assignment as used in the statute has a technical meaning and must be so construed."

If there be doubt as to whether a deed be an assignment or a mortgage, the courts construe it to be a mortgage.

Bell vs. Carter, 17 Beavan, page 11, at pages 13 and 14.

In the citation of authorities from different States their statutes must be regarded.

Indiana Statute, as reported in *Grubbs vs. Morris*, 103 Ind., page 166 *et seq.*, at page 167, is as follows:

"Any debtor or debtors in insolvent or failing circumstances, may make a general assignment of all his or their property in trust for the benefit of all his or their *bona fide* creditors, and all assignments hereafter by such person or persons for such purpose, except as provided for in this act, shall be deemed fraudulent and void."

Under such a statute if a deed on its face shows an intention on the part of the assignor to come

under this law the Court might well hold that all his property was included (for such was the intention, if he intended to come in under the law), and that such assignment was for all creditors, for he intends to conform to the law.

Under such a statute when the deed on its face shows an intention to conform to the law, the deed is not void; but the objectionable features may be disregarded and it may be held that such deed is for all creditors and embraces all his property, for he intends, on the face of the paper, to come under the Assignment Law. This is what the Indiana courts hold. [*Hassfield vs. Seyfort*, 105 Ind., 534 *et seq.*]

In the case at bar the question presented in second sub-division of certificate of division in opinion is quite different. Does this deed of trust enure as a voluntary assignment? It is not such voluntary assignment on the face of the paper. The parties to that paper do not evince, on the face of the paper, a determination to come in under the Assignment Law. They discussed the feasibility of making a voluntary assignment, and decided against it.

The Ohio Statute is thus:

"All assignments of property in trust which shall be made by debtors to trustees in contemplation of insolvency with the design to prefer one or more creditors to the exclusion of others, shall be held to enure to the benefit of all the creditors in proportion to their respective demands."

The above is quoted from the opinion of the

Court—*Hordraker Crane et al. vs. Leighy et al.*, 4 Ohio State R., p. 602 *et seq.*, at pages 607–8. In this case a mortgage was made to George Leighy, Jacob Leighy and Joseph Leighy. The condition was that if the money due them was paid, and if money due to others was paid, then it was to be void. Adding the names and debts of these third parties made the mortgage an "assignment of property in trust" within the meaning of the statute.

The Court, in rendering the opinion, at page 609, say:

"This statute was not designed to supply the place of a bankrupt or insolvent law by compelling an equal distribution of the property of an insolvent debtor among his creditors; and the attempt to do so, by preventing him from using it in the payment or security of particular creditors, would have been little less than absurd, while it was confessedly within their power to obtain the same preference by liens or levies upon judgments confessed by him. Such a construction finds no warrant in its language or the objects and purposes for which it was enacted. To bring a case within the operation of the law there must be a transfer or conveyance of property or some valuable interest belonging to the insolvent debtor, in view of his insolvency, to be held by the person taking it for the benefit of some one or more of the creditors of the debtor other than himself."

A simple mortgage where the property is conveyed upon condition to be void if the money is

paid is not within this statute. [See cases cited in opinion of the Court.]

A transfer "in trust" is within this Ohio Statute, whether the trust is "to" pay or "secure" makes no difference; in either case it is in trust.

In *Crow vs. Beardsley*, 68 Mo., 438, we copied the deed of trust in this brief. That deed of trust is a conveyance in trust, but the trust is "to secure" and, therefore, the Court say: "The deed in question here is, therefore, a deed of trust in the nature of a mortgage."

In Ohio a conveyance in trust either to seeure or pay is within this Ohio Statute, thereby we infer that without this statute a conveyance in trust to secure would not be a voluntary assignment. It is the statute which makes such conveyance a voluntary assignment.

The Statute of New Hampshire is as follows. I quote from the opinion of the Court reported in *Danforth vs. Denny*, 25 N. H., page 155 *et seq.*, at page 164:

"No assignment for the benefit of creditors shall be valid unless it provides for the equal distribution of all the estate, rights and credits of the debtor among all of his creditors in equal proportion to their respective claims."

In *Mer. Mf'g Co. vs. Smith*, 8 N. H., p. 347, at page 348, the Court say:

"It never could have been the intention to prohibit a debtor from assigning any particular property he might possess for the purpose of paying

any particular debt or debts that he might owe. Such a prohibition would be absurd so long as any creditor or creditors are permitted, as they are by our laws, to attach any property of the debtor, and thus apply it to the payment of their debts without the consent of their debtor."

In Missouri we can attach property or take it on execution. There is no prohibition. The Court here conclude with Judge BREWER's opinion that such a statute was intended to apply only to what are known as technical assignments.

In *Lowe vs. Wyman*, 8 N. H., 536 *et seq.*, at page 538:

"The statute could never have been intended to embrace a mortgage or pledge of any or all of a man's property for the security of a particular debt. A debtor has an undoubted right to convey all his property to one of his creditors in satisfaction of his debt. The statute was not intended to prohibit such a preference. And if he can convey all his property in satisfaction of a particular debt, there seems to be no sound reason why he should not be permitted to pledge all his property to secure the payment of such debt."

Again the act is restricted to technical assignments.

Speaking on the same subject, in *Barker vs. Hall*, 13 N. H., page 293, at page 302, the Court say:

"It was not its purpose to do away with all preferences whatsoever among creditors by the vol-

untary act of their debtors. So great a change in the law as that could not have been contemplated. There was no call for it, and it would be wholly inconsistent with the policy of our laws and with all usage and practice under them. And, indeed, that would be extremely unreasonable legislation which would defeat all conveyances by the voluntary act of the debtor, having for their object the fair security of a particular debt and thereby giving preference, while at the same time it authorized the creditor himself to obtain security and preference compulsorily by force of attachment on legal process."

In *Danforth vs. Denny*, 25 N. H., 155 *et seq.*, all the cases are reviewed and the same conclusions are reached.

One of the grounds for attachment in Mississippi is that "the debtor has assigned or disposed of, or is about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors, or *give an unfair preference to some of them.*"

If a person be insolvent, unable to pay all his creditors, it would seem at first sight to be an "unfair preference" to secure and pay one in full and leave others unpaid. It is held that no preference can be unfair which is legal, and by common law a failing debtor may prefer creditors. The Supreme Court of Mississippi and this Court were very careful and guarded in the construction of this statute. To be unfair the preference had to be illegal. The

court adhered to the general common law, and no change was construed to be made except where such change was plainly intended on the face of the statute.

Fitzpatrick vs. Flanagan, 106 U. S., p. 647, at pages 658–9.

The course of decision in New Jersey is like that of other courts. *Nat'l Bank vs. Sprague*, 20 New Jersey Eq., page 13 at page:

"It is next contended by the complainants and the judgment creditors that the mortgage to the trustees is void, for two reasons: first, because it operates to delay and hinder creditors, and secondly, being a mortgage of all or nearly all of the property of the firm to the trustees, and not being for the equal benefit of all the creditors, it is against the express provision of the Assignment Act. It is settled by a series of decisions had for years in this State, that a debtor, though insolvent, has the right to prefer creditors by payments of money, transfers of property, giving mortgages and confessing judgments."

So a mortgage of all or nearly all a debtor's property is not an assignment under their law.

The Statute of New Jersey—I quote from the opinion of the Court in *Garretson vs. Brown*, 2 Dutcher, p. 425, at page 434:

"Every conveyance or assignment made by a debtor or debtors of his, her or their estates, real or personal, or both, in trust to the assignee or assignees for the creditors of such debtor or debtors,

shall be made for their equal benefit, in proportion to their several demands to the net amount that shall come to the hands of said assignee or assignees for distribution; and all preferences of one creditor over the other, or whereby any one or more shall be first paid, or have a greater proportion in respect of his, her or their claim than another, shall be deemed fraudulent and void, except mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors."

Assignment was made which, upon its face, complied with the law.

"But it is contended that this assignment is fraudulent and void on several grounds, viz: 1. That the said Thomas C. Brown previous to the assignment confessed a judgment to John J. Brown, the assignee. 2. That Demorest had, previous to the said assignment, conveyed a house and lot to one Pharo to secure a debt due Pharo and Dolson from the firm. 3. That the assignors had, shortly before the assignment, disposed of a large portion of their assets and applied the proceeds to the payment of certain favored creditors, and that all these acts were done in contemplation of the assignment, with full knowledge by the assignors of their insolvency and with the view to prefer certain of their creditors."

At page 439 the Court say:

"The argument of the defendant's counsel, that all preferences made by an insolvent debtor

anterior to his assignment, but with a view to or in contemplation of such assignment, are intended to be declared fraudulent and void by the statute, cannot be sound.

"At common law the right to prefer creditors is undoubted. If the statute meant to abridge so important a right, it would have said so in plain terms."

The preferences spoken of in the act are construed to be preferences in the deed itself. By adopting the construction contended for, the Court says it will force courts, counsel and litigants into a shoreless sea of difficulties not contemplated by the law makers.

ELMER and Chief Justice VREDENBURGH concur in a separate opinion, but say that the preferences need not be given by the deed itself. The separate opinion quotes the statute thus:

"And all preferences of one creditor over the other, or whereby any one or more shall be first paid, or have a greater proportion in respect of his, her or their claim than another, shall be deemed fraudulent and void, except mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors."

Then the concurring opinion continues:

"Certainly these words are broad enough to include any preference not provided for in the assignment, but made in contemplation of such an act."

It is the statute that makes the preference

void or illegal, not the general law. The Missouri Statute contains no such language.

The Court, continuing, said (after saying that the question was not before the Court):

"I cannot doubt that such preferences are voidable upon general principles as well as by the plain terms of the statute, and I see no difficulty in applying the rule of the English courts in cases of bankruptcy, that such preferences are invalid as have been given voluntarily, without pressure from the creditor, and with the view of giving a fraudulent preference in contemplation of an assignment. [Page 444.]

But in the case at bar, a voluntary assignment was never made. Then what is a fraudulent preference? Securing or paying an honest debt may be a preference, but by general common law it is not fraudulent. What statute makes it fraudulent? What is a fraudulent preference? The conveyance to come within the *obiter dictum* of the Court must be, 1st, a preference; 2d, it must be fraudulent; 3d, it must be made in contemplation of an assignment. If the preference is fraudulent, it is (like everything else fraudulent) void and of no effect. If the preference be fraudulent, making an assignment adds nothing to it and takes nothing from it. Likewise if the preference be fraudulent, contemplating an assignment adds nothing to it and takes nothing from it. Under the decision above referred to, suppose the party contemplated an assignment but never made it? What then? Suppose the prefer-

ence fraudulent, but the party never makes an assignment and never contemplates making one. Courts won't enforce anything fraudulent, whether it be a preference or anything else.

The Statute of Connecticut is as follows, as reported in 10 Conn., page 293:

"That all conveyances and assignments of any lands, tenements, goods, chattels or choses in action hereafter made, directly or indirectly, by any person in failing circumstances with a view to his insolvency, to any person or persons in trust for his creditors, or any of them, shall as against the creditors of the person making such conveyance or assignment be deemed and adjudged fraudulent and utterly void, unless the same be made in writing for the benefit of all said creditors in proportion to their respective claims."

The Court in rendering opinion at page 293, say:

"In the first place the statute does not embrace the instrument. It does not therefore prohibit a *mortgage* 'by a person in failing circumstances with a view to his insolvency.' The prohibition is of *conveyances* and *assignments*. But surely a mortgage is not an assignment, for that passes the whole interest in the thing assigned, whereas a mortgage creates a lien only in favor of the mortgagee. Nor is it a conveyance within the meaning of that term as it has been understood by jurists in New York, Massachusetts, Maine and Connecticut for the last

thirty years, and by the English judges for the last half century."

English and American authorities are referred to and continuing, the Court say:

"In the next place this statute does not profess to break in upon the long established doctrine of the common law, that a debtor may prefer one creditor to another; nor upon our law authorizing the attachment of the real and personal property of the debtor. It is insisted by the counsel for the defendant, that the great object of the enactment of 1828, was that the estate of an insolvent debtor should be equally distributed among his creditors. If such was their object, it is very strange that no suggestion of the kind, no provission to effectuate such intention, should appear. Nor can it be believed that the suggestion intended anything in the nature of a bankrupt law. Such a law cannot coexist with the subsisting provisions respecting attachments.

"The single object, so far as I can discern, was to provide a responsible trustee to receive the property when assigned for the benefit of creditors, and to cause it to be distributed proportionately among those creditors; but not at all to interfere with the long established principle of a debtor giving preference voluntarily, or with a law of Connecticut of an ancient standing authorizing a preference by attachment."

The Circuit Court of the United States for Connecticut, in *Pomeroy vs. Martin*, 2 Paine's Circuit

Court Reports, page 476 *et seq.*, at pages 490–1 and 2, comes to the same conclusion on the same statute. The reasoning is clear and full and to the point.

In Pennsylvania a course of decision was started similar to that begun in *Martin vs. Houseman*, 14 Fed. Rep., 160 *et seq.*, but the decisions were finally overruled.

These decisions are founded on the Acts of 1843 and 1849. I am unable to copy these acts into this brief. The acts were of April 17, 1843, and April 16, 1849. Speaking of *Blakey's Appeal*, the Court in rendering the opinion in *Sumner's Appeal*, 4 Harris, or 16 Penn. St., page 170, at page 174, says:

"We held that the Act of 17th of April, 1843, entitled, 'An Act to Prevent Preferences in Assignments,' did not avoid such *bona fide* judgments and was confined to preferences contained in the assignment itself, according to the plain meaning of the act. But in the opinion delivered in that case, it was stated that if the Legislature extended the interdict to confession of judgment by a man in embarrassed circumstances, who afterwards executed an assignment, this Court would cheerfully carry out such enactments. The Statute of 16th of April, 1849, entitled, "An Act Supplementary to the Act About Lunatics and Habitual Drunkards," 4th Section, seems to have been an acceptance of the overture and was no doubt enacted in consequence of that decision. The act is exceedingly obscure—

counsel pronounced it insensible—but there is a glimmering of intent in it. The clause is as follows:

"Provided that no *bona fide* judgment or lien acquired against the property of any debtor, or any sale, or transfer of the property of any debtor, unless the same shall have been acquired or made with intent to evade the provisions of said act, shall be avoided or defeated by the subsequent discovery that such debtor was insolvent at the time such judgment was obtained, lien acquired or transfer made. * * * The objects of the Acts of 1843 and 1849, seem to be to force a debtor who makes an assignment in *invitum*, into a sort of bankruptcy, so far as the creditors ar concerned, without equivalents of bankruptcy to himself."

Here judgments were confessed, followed in a few days by an assignment. The funds were divided equally among all creditors.

Speaking of this case, in *Uhler vs. Maulfair*, 23 Penn. St., or 11 Harris, 484–5, the Court say:

"It is equally clear, and legitimately flows from what has been said, that the Court was also correct in declaring that the case of *Ashmead vs. Hean & Maulfair* as reported in 1 Harris, 584, is not the law of the land. That case was in principle the same as the unfortunate case of *Sumner's Appeal* and they fell together."

In *Covunhoovon vs. Hart*, BLACK, C. J., in rendering the opinion of the Court, at page 500, says:

"If a debtor with the purpose to cheat his

creditors converts his land into money because money is more easily shuffled out of sight than land, he, of course, commits a gross fraud. If his object in making the sale is known to the purchaser and he, nevertheless, aids and assists in executing it, his title is worthless as against creditors, though he may have paid a full price. But the rule is different where property is taken for a debt. One creditor of a failing debtor is not bound to take care of another. It cannot be said that one is defrauded by the payment of another. In such case, if the assets are not large enough to pay all, somebody must suffer. It is a race in which it is impossible for every one to be foremost. He who has the advantage, whether he gets it by the preference of the debtor or by his own superior vigilance, or by both causes combined, is entitled to what he wins, provided he takes no more than his honest due. To pay a creditor his just due in land at a fair valuation, is no more a fraud upon other creditors than to pay him in bank notes or silver dollars. Neither is it any worse or more fraudulent for a creditor to secure himself by taking a conveyance than it would be to enter up a judgment. He gets no greater advantage by the former means than by the latter. The notion of defendants in error seems to be that the creditor of an insolvent man cannot avoid the imputation of fraud in any way except by cheating himself. But they themselves did not act upon this principle. They struggled to get a lien upon the very property in dispute, and if

they had succeeded, would have done to the plaintiff the same injury (if it be an injury) which he did to them by taking the conveyance."

If the Union National Bank and Bernard & Lyman had been successful in their attachment, perhaps you would not be troubled with this case.

The Court, continuing, said:

"It cannot be denied that there is anything in our books for the decisions of the Court below. The unfortunate case of *Sumner's Appeal, Ashmead vs. Hean*, 1 Harris, 587, and some others decided about the same time, would sustain it if they could be themselves sustained. But reason and justice have vindicated their supremacy against those judicial invasions of it. The Legislature did what it could to restore the law and this Court has been compelled by considerations heretofore fully stated to abandon the error. A rule which requires one man to take care of his neighbor's interest at the expense of his own is entirely impractiable in the present state of human society. It runs against the bent of a natural feeling which will not be crushed or extinguished. *Naturam expellas furca; tamen usque recurret.* The attempt to force it had no result but intolerable mischief."

The same Court, in deciding *Hutchinson vs. McClure*, in 20 Penn. St., page 63, at page 66–7, say:

"In *Worman vs. Wolfsenberger's Executors* (see 7 Harris, 59), it was shown that according to all the decisions upon statutes enacted to prevent

frauds upon creditors, the party who obtained a security, or a conveyance in good faith, was not affected unless he participated in the wrongful intent of the debtor in giving it, and it was declared that the doctrine in *Sumner's Appeal*, 4 Harris, 169, was a departure from the principles which had usually governed courts in the construction of statutes similar to the proviso in the Act of 1849, and that there was something so revolting to the most ordinary sense of justice in depriving any one of a vested right, a lien for a just debt, without any fault of his own, that it ought not to be done except in obedience to the plain and imperative mandate of a power not to be resisted." Is there any such "plain and imperative mandate" in the Act of 1849? Far from it. Even the learned Judge who engrafted on it the construction in question, admits in his opinion that the act is "exceedingly obscure," and that there is but a "glimmering" of such "intent" in it. [4 Harris, 174.] And the legislative and executive departments, so far from admitting the intent, within less than a year after the decision was pronounced, repealed the proviso upon which it was founded, and thus extinguished the *ignis fatuus* which had led the judicial mind astray. Although this appeal cannot operate retrospectively upon rights which had previously vested, the judgment of the other branches of the government in cases admitting of doubt is certainly to be treated with respectful consideration. The decision of *Sumner's Appeal* was a departure from

the great principle which requires that statutes in derogation of the common law shall receive a strict construction. It was pronounced in manifest forgetfulness of an uninterrupted current of authority upon the construction of similar clauses in statutes to prevent frauds upon creditors. It was an invasion without legislative warrant of the long established right of the citizen, where he has not surrendered the dominion over his property to others, to conduct his affairs in his own way.

It was a violation of a maxim of universal justire, which declares that no one shall suffer for another's fault. *Nemo punitur pro alieno delicto.* Its tendency is to produce uncertainty and litigation, and its results if adhered to would be to throw into confusion the plain business transactions of a community where commercial enterprises prosper most when left to their own activity, intelligence and vigilance. In overruling it we correct a plain mistake: we affirm as a principle not to be denied that the judicial power is not authorized to make new and inconvenient innovations upon the rights of the people or to alter the law of the land upon a mere "glimmering" of legislative intent, and we replace ourselves upon ancient foundations, in accordance with the true doctrine of *stare decisis* and in obedience to the authoritative voice of the law."

We have quoted at length the Missouri Act of 1864, as well as Section 354, Rev. Stat. of Mo. of 1879. *Martin vs. Houseman*, 14 Fed. Reporter, 160 *et seq.*, is the Missouri "*Sumner's Appeal.*" This

Missouri case was decided by Judge KREKEL, then District Judge, who says [page 166]:

"When the inconsistency of thus discriminating between creditors, was pointed out by Judge NAPTON in 1858, the law was amended in 1864 by a new section providing that every assignment in trust for creditors shall be for the benefit of all the creditors of the assignor. Was this intended to prohibit a failing debtor from giving preferences at all? I am inclined to think so," etc.

On this, "I am inclined to think so," are built all the decisions in the Circuit Court of the United States for Missouri.

In *Kerbs vs. Ewing* it is said it makes no difference about the form of the deed. That case has been quoted heretofore. In Pennsylvania, her courts have rightly decided that they could not change the general law upon a mere "glimmer" of reason in the statute. In Missouri we have not the "glimmer" of intent in the statute. Counsel for complainants would gloat over it if they had in the Missouri Statute one-tenth part of the reason there is in the Pennsylvania Statutes as reported in the cases quoted from. The Missouri cases are all founded on an "I am inclined to think so."

Section 354 was not designed as a bankrupt law. The Missouri Legislature did not intend thereby to enact that in all cases if a person be insolvent, his property should be divided ratably among all his creditors. *Roan vs. Winn*, 93 Mo., *et seq.*, is conclusive against this. Roan was a cred-

itor of the Macon Savings Bank, of which James B. Melone, one of the firm of Benedict, Melone & Co., was president. He presented his claim for allowance and the assignee allowed it. This was a judgment so far forth as to enable the holder to prosecute the suit. Now, this creditor who came in under the assignment brought a suit against Webb, Mr. Rubey, assignee of the bank, and Winn, to set aside a deed to Winn by the bank, and to subject the land to the payment of the plaintiff's debt. Winn appeared and filed an answer. Rubey, the assignee, filed what would be a cross-bill, asking that the deed be held void and that the land be decreed to him as assignee, to be devoted to payments of debts generally, thus making the land go to the benefit of all creditors. The Court below set aside the deed. This portion of the decree was affirmed. The Court below allowed $200 as attorney's fees to plaintiff for bringing the suit, and awarded the land to the assignee. The plaintiff appealed because he wanted the land wholly devoted to the payment of his debt. The Court reversed the judgment decreeing the land to the assignee, and directed a decree that the land be sold and the proceeds applied to the payment of the plaintiff's debt. The fraud was against all creditors, and the bank, too, for that matter, yet one creditor who sues gets all on his own debt. The United States Circuit Court seem to hold differently, especially after the party has tried to get the whole

property himself and fails, and then brings the suit for all creditors.

Elgin Nat'l Watch Co. vs. Meyer et al., 29 Fed. Rep., 225.

James B. Melone is found to have assented or directed an assignment to be made. The other partners, Benedict and Richard A. Melone, discussed the subject of making an assignment, and decided against it. The paper on its face is a deed of trust in the nature of a mortgage. There is no reason why the absent partner should ovverrule the two active managing partners. This deed of trust does not enure as a voluntary assignment under Section 354. When the decision in the case of *Martin vs. Houseman* announced the conclusion that it was the intention of this statute to do away with all preferences by failing debtors, the conclusion was a grevious error. The statute expresses no such intention. No means are provided by law to carry out such intention.

By general common law the owner of property may convey it on any trusts he may desire. If he convey on trust to pay creditors, then this is a voluntary assignment. The trust to pay creditors is a lawful trust. By general common law he has this privilege, but he is not bound by the general common law to convey his property in trust to pay his creditors. The statute (Sec. 354) does not make it his duty to make a voluntary assignment. The owner of property may or may not create this

trust to pay creditors. He may or may not make a voluntary assignment. Even if insolvent, a debtor in Missouri, by failing to make a voluntary assignment, does not commit a fraud on the Assignment Law. The idea advanced is that this Section 354 was intended to prevent all preferences by a failing debtor. Such a debtor can accomplish the purpose intended by the law, viz: an equal distribution *pro rata* among all their creditors by a voluntary assignment. It is the debtor's duty to comply with the law. Preferences by a failing debtor are in contravention of this law. This reasoning has no foundation in this law. A voluntary assignment is the privilege of the failing debtor. It was his privilege under the general common law. The statute was not intended to make any change. The requirements of the late Bankrupt Law for an equal distribution of a failing debtor's property were stronger than the Missouri Statute, and yet it imposed no duty on the failing debtor to resort to bankruptcy proceedings. He had the privilege of going into bankruptcy. The reasoning under the Bankrupt Act was thus: "That the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency; and that to secure this, it is the legal duty of the insolvent when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is one to be inferred from the spirit of the law and is essential to its successful

operation. [*Wilson vs. City Bank*, 17 Wallace, 473, at pages 484–5.]

"We do not construe the act, (the Bankrupt Law) to cover all cases of insolvency to the exclusion of other judicial proceedings." [Same case page 486.]

"Was this intended to prohibit a failing debtor from giving preferences at all? I am inclined to think so." [*Martin vs. Houseman*, 14 Fed. Rep., 166.]

"Instruments by which debts are thus secured do no fall within the provisions of the Assignment Law, while such as dispose of the whole of the business and the property of the assignor, thereby declaring insolvency, are held to fall within its provisions." [*Martin vs. Houseman*, 14 Fed. Rep., at page 166.] Under this decision, of course, a deed of trust on all the property and business of the debtor, thereby declaring insolvency, is a voluntary assignment. I presume the "instrument" might likewise be an attachment or execution or a bill of sale, or a verbal sale or a confession of judgment and execution issued and levied on all the property, for "Was this intended to prohibit a failing debtor from giving preferences at all? I am inclined to think so."

Of course, after such a decision any one might know that the jurisdiction of the United States Circuit Court would be practically confined to that of declaring chattel mortgages voluntary assignments. No cases would ever be brought in the

State court except where there was less than five hundred dollars or where all the parties were citizens of Missouri. The Kansas City Court of Appeals and the St. Louis Court of Appeals have jurisdiction if the amount involved be $2500 or less. A case involving more always goes to the tribunal wherein *Martin vs. Houseman* was decided. Judge BREWER does not concur in the doctrines laid down in *Martin vs. Houseman*. Judge THAYER is of the same opinion with Judge BREWER, according to opinions quoted herein. Judge PHILIPS we know does not concur in it. We know this from his opinions while presiding judge of the Kansas City Court of Appeals. Justice MILLER evidently was not satisfied with the doctrines of that decision: "Was this intended to prohibit a failing debtor from giving preferences at all?" If it was so intended then that is the law. If a failing debtor is prohibited from giving preferences, then the creditor is prohibited from receiving preferences. Then the failing debtor can't pay one debt in full, for this is a preference and the debtor can't give it, and the creditor can't receive it. If he can't receive the preference directly, he cannot get it indirectly by attachment or execution, for the failing debtor is prohibited "from giving preferences at all."

Section 2503 of the Statutes of Missouri has been quoted. By that section a chattel mortgage or deed of trust, where possession is delivered or where the mortgage or deed of trust is acknowledged and recorded, it is intended that the chattel

mortgage or deed of trust shall be valid against other creditors. From a solvent debtor a creditor don't need a chattel mortgage, and from the insolvent debtor it is of no account for the purposes intended. James B. Melone's consent to an assignment never made does not avail. The question of an assignment was discussed and the active partners decided against it. They intended not to make a voluntary assignment. The question should be answered, No.

The third question in the certificate of division is stated thus [printed record, page 73]:

"3. Does the making of that deed of trust and the appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the proceedings, to administer the assets of the insolvent partnership, to which the banks, and Stewart, and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors, and require the receiver to administer the funds in his hands in that manner?"

This deed of trust was made February 16, 1882, to Charles Stewart, trustee, to secure these banks. On the same day Chas. Stewart, the trustee in the deed of trust, was appointed receiver for the firm in the case of *Chas. Benedict vs. Richard A. Melone and James B. Melone.* The partners assented to the appointment of Chas. Stewart receiver. As receiver there has never been any complaint against Chas. Stewart.

Do this deed of trust and appointment of the receiver constitute a voluntary assignment?

Now, notwithstanding the firm of Benedict, Melone & Co. were in fact insolvent when they made this deed of trust and when the receiver was appointed, they supposed they would have a surplus after the partnership debts were paid.

"Now, in the morning you first came to your office, don't you remember that we discussed as to the amount of your liabilities on the one side and the amount of your assets on the other?" A. "Yes, sir, I remember that."

"How much was the net amount that would be left to the firm after the payment of these liabilities, as we then considered it?" A. "Well, there was an amount showed by the books somewhere between twelve and eighteen thousand dollars; that was according to the figures we had."

"You really expected that it would be all right—you really supposed there would be $18,000 left after the debts were all paid?" A. "Yes, sir, that was the conclusion we came to." [Testimony of R. A. Melone, page 105.]

"Don't you know that it was contended there that there was no use to make an assignment if you were going to have $18,000 surplus?" A. "Well, I know there was something of that kind stated there."

"Don't you know that we finally came to the conclusion that whatever he (James B. Melone) had there, we would bring into court in a suit to

wind up the partnership and ascertain what he had, and that it would then be in court and his creditors could get it if they wanted it?" A. "Yes, sir." [Same witness, page 106.]

"Don't you remember my asking you what would be left, after paying all the debts and liabilities, for distribution? A. "Well, I remember that question being asked a half dozen times that day. I don't know that I answered it or who answered it, but it was answered by one of us, and we thought it sufficient at the time." [Page 107.]

After the transactions were completed, this witness wrote his brother, James B. Melone, that the banks at Kansas City had been preferred, and the reasons for it. [Page 112.]

"And you supposed *at that time* that your assets considerably exceeded your liabilities?" A. "Yes, sir; on paper they did, sir."

C. H. Benedict [page 135]:

"Now, if there were any representations made at the time of the making of the deed of trust and filing the petition for a receiver as to the solvency of the firm, you may state what they were?" A. "Well, the parties asked me if I thought we would pay out, and I told them yes, I thought so; and I did think so."

"You were honest in that?" A. "Yes, sir; that is one reason why I did not object to preferring the banks, because I thought there would be plenty of money to pay them all. The banks might get their money a little quicker, but I

thought there would be plenty to pay them all; that was my idea about it."

"You may state if you knew the condition of the firm at that time?" A. "Yes, sir; as near as anybody could know its condition; I thought the firm's condition was all right. We never had any trouble in meeting our obligations. We always had done that and if it had not been for the bank we would yet, I suppose." [Page 135.]

Again [page 142]:

"And that you would have a large surplus left for the division among the partners?" A. "Well I don't recollect what was said about that, but I thought there would be plenty to pay off everybody and we would have something left."

Again [same page 142]:

"Don't you remember that you discussed the propriety of going ahead with the business and not having any receiver or making any assignment at all, but ascertain his interest and pay it off?" A. "Oh, yes, that was talked about."

Again [in page 144]:

"Didn't you then suppose they (creditors) would be paid in full and a large surplus left?" A. "Yes, sir."

"You expected, though, to receive something from your capital invested in the business here?" A. "Yes, sir; I think so."

"And you supposed R. A. Melone would have something coming to him from the business here after all the debts were paid?" A. "Yes, sir."

"Did you not expect at that time, you and R. A. Melone, that you would go on with the business afterwards here with the capital you expected to get out of this firm?" A. "Well, if they had panned out as we thought it would, we probably would have done so." [Page 145.]

Again [page 146]:

"How long after February 16, 1882, did you continue to believe that the assets of the firm of Benedict, Melone & Co. would pay all their debts and liabilities and leave a surplus for division among partners?" A. "Well, I believed so for some time afterwards; I don't know how long, but until the matter commenced to show up."

"Was it not as much as a month afterwards?" A. "I expect it was."

Again [on page 147]:

"You had expected that the debts would be paid in full and your capital in the business would come out unimpaired?" A. "Yes, sir."

Again [on page 152].

"Now, Mr. Stewart suggested that the Bank of Commerce should be preferred and it was on the theory that inasmuch as he had recommended you to that bank and to a certain extent given you credit at that bank, he thought it desirable that you should prefer them?" A. "Yes, sir; it was upon that idea and I had no special objection to preferring them, as I thought we would pay everybody, anyway, but I wanted, then, all the banks

preferred and wanted to protect our interests here."

L. F. Wilson, Vice President of respondent, the Bank of Commerce, says [pages 164 and 166]: that Benedict and Melone told him they would have a surplus after paying all debts, of $18,000 to $20,000.

Again, the statement of the condition of the firm is on page 205. Balance over all debts is $18,646.46.

Charles H. Benedict began suit in the Jackson Circuit Court, at Kansas City, against James B. Melone and Richard A. Melone on February 16, 1882, after the deed of trust was made and delivered. This petition is on page 210 of printed record. It sets out the partnership of plaintiff and defendants. That such partnership began in 1880; that it is dissolluble at the will of any of the partners; that plaintiff had contributed large sums of money towards the partnership; that each of the defendants had likewise contributed large sums of money; that the firm owe debts for merchandise; that they have a large stock of goods and debts due them; that James B. Melone has become insolvent and can no longer continue in the firm.

The prayer is to appoint a receiver for the partnership property; that the firm property be sold; that the partnership debts be ascertained and paid and that an account may be taken and stated of what is due each partner and that the same may be paid, and for general relief.

On filing this petition, the Jackson Circuit Court made an order appointing Chas. Stewart receiver of the firm property, requiring bond with security in the sum of $125,000, which was given. Charles Stewart, receiver, proceeded under orders of the Court to file inventory and appraisement, and under orders of the Court in the above cause he proceeded to sell the stock and collect the debts.

The firm were generally understood to be solvent at least up to March 13, 1882, when the Continental Sugar Refinery, one of the complainants in this case, brought its suit by attachment in the Jackson Circuit Court and garnished Chas. Stewart, receiver. This had to be done by leave of Court. The application for that leave is on pages 216–7, printed record. In it (which is sworn to) it is stated "that it is given out by and on behalf of defendants and by their counsel, that said firm owes about $30,000, including said bank debts, as he is informed, and that their assets are worth about $65,000." The inventory filed by Chas. Stewart made $71,947.

The case of *Charles H. Benedict, Plaintiff, against James B. Melone and Richard A. Melone,* wherein Stewart was appointed receiver, had not gone into final judgment at the trial of this cause in the court below. It is not yet in final judgment.

On March 7, 1885, Section 354 was so amended as to read as follows:

SECTION 354. "Every voluntary assignment

of lands, tenements, goods, chattels, effects and credits, made by a debtor to any person in trust for his creditors, shall be for the benefit of all the creditors of the assignor in proportion to their respective claims; and any provision in any assignment providing for the payment of one debt or liability in preference to another shall be void; and all debts and liabilities (including judgments entered by confession thirty days previous to such assignment) shall be paid *pro rata* from the assets thereof; and every such assignment shall be proved or acknowledged, and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed."

The foregoing extracts from the evidence show that this proceeding in court to wind up the partnership, ascertain the debts and pay them, and to take and state an account between the partners was undertaken in good faith; it was not intended as a sham. The deed of trust was made by the partners; the receiver was appointed by the Court. The partners had no power to compel the Court to appoint Mr. Stewart; that was the judicial act of the Court. Now, does the making of this deed of trust, with the act of the Court in appointing Chas. Stewart receiver, constitute a voluntary assignment for the benefit of creditors, and must the receiver conduct the whole as an assignment, one part of which is the deed of trust and the other the receivership?

There are not wanting decisions to the effect

that where two instruments are made at the same time, to effectuate one purpose, they may be considered together as one. Generally one paper refers to the other, and by such reference the paper referred to becomes a part of the paper making such reference, the same as if copied into it. But here the order of Court appointing this receiver makes no reference to the deed of trust.

In *Sampson vs. Shaw*, 19 Mo. Appeals Rep., page 274 *et seq.*, we have these facts:

Gummersell brought suit by attachment against Hanbloom. He attached a stock of goods. Sampson filed an interplea claiming the goods under a chattel mortgage. Shaw filed an interplea claiming the goods under a voluntary assignment.

"By agreement of parties, the two interpleas were tried together by the Court without the intervention of a jury. It was admitted the assignee received property to the amount of fourteen dollars only outside of the property in controversy." So that the mortgage embraced all the property.

"For them the Court declared the law to be: (1) If the Court finds that the mortgage to Sampson and the deed of assignment to Shaw were both made under a common understanding between Hanbloom and the mortgagees, that Hanbloom was to make the assignment and that he intended to prefer Sampson in the distribution of his effects, and that for that purpose and with that intention Hanbloom and the mortgagee made and received the mortgage, to be followed by the assignment,

and that the two deeds were so made to avoid the law prohibiting preferences in assignments, then all said acts were to be regarded as parts of one transaction, and the said mortgage has no effect to give Sampson a preference over the other creditors, and the claim of the assignee to the property in controversy must prevail."

The Court found the issues for Shaw, the assignee, and against Sampson, the mortgagee.

In rendering the opinion, HALL, Judge, says:

"There was sufficient evidence upon which to found the declaration of law given by the Court for Shaw. Then the first question for our consideration is: Does that declaration of law, abstractly considered, contain a correct statement of the law."

This instruction assumes that the mortgage and the voluntary assignment were made under a common understanding between the assignor and mortgagee that Hanbloom was to make the assignment. He intended to prefer Sampson; for that purpose and with that intention Hanbloom and the mortgagees made the mortgage to be followed by the assignment; the two deeds were so made to avoid the law prohibiting preferences in assignments, still the mortgage is not invalid.

"We think our statute is founded upon an entirely different base from a bankrupt law, and that it goes no further than to forbid preferences *in and by the instrument by which the debtor surrenders to his creditors all dominion over his property*; and

that a distinct and special transfer by a debtor before he has surrendered such dominion, even though in contemplation of a general assignment, is valid and not within the statute."

The case is well reasoned throughout. An attachment or execution levied ten minutes before an assignment is made is valid against the assignee. Why should not a preference voluntarily given ten minutes before be equally valid? It would make no difference that the execution creditor or attaching creditor knew that an assignment was about to be made.

Benedict and Richard A. Melone discussed the question of making an assignment and decided against it. They intended not to make an assignment. [Printed Record, pages 132, 146–153. In the case at bar no assignment was made or intended.

In *Gilbert, Assignee, vs. McCorkle*, decided by the Supreme Court of Indiana, March 28th, 1887, reported in Vol. 11, Northeastern Reporter, at pages 296 *et seq.*, this question is fully discussed. We ask the Court's careful attention to it as the authorities are fully cited and reviewed.

See *Field vs. Fisher*, decided by the Supreme Court of Michigan, April 28, 1887, reported in Vol. 32, Northwestern Reporter, at page 838 *et seq.* and cases cited.

We cannot quote the Statute of Michigan, but in *Whipple vs. Stebbins, Receiver*, decided Nov. 10, 1887, reported in Vol. 35, Northwestern Reporter,

at pages 94 *et seq.*, it seems to be more of a bankrupt law than the assignment law of Missouri, and yet by that case a mortgage made immediately before an assignment is a valid mortgage.

The Kansas assignment law is similar to that of Missouri, yet a mortgage made on the same day with an assignment is not part of it.

Bailey vs. The Kansas Mf'g Co., 32 Kansas, 73 *et seq.*

By general common law this deed of trust and this receivership do not constitute a voluntary assignment. The Statutes of Missouri do not declare that such deed of trust alone or in connection with the receivership shall be a voluntary assignment. They together should be both so construed that both may stand. This was the intention of the parties, apparent on the deed of trust and the equity suit in which the receiver was appointed. If the receivership and deed of trust are a voluntary assignment, no account can be taken between the partners, for this whole matter is under proceedings provided by statute. The whole course of proceeding is different, as will appear by reading Section 354 and all the sections following it.

By Revised Stat. of Mo., Sec. 3815, chattel mortgages or deeds of trust must be recorded in a series of volumes separate from all others. By Section 354, a voluntary assignment of chattels is required to be recorded in the same book with conveyances of lands. Here in the case at bar this deed of trust was recorded in chattel mortgage record book. The

order appointing the receiver is recorded among the records of the Jackson Circuit Court. It is said the two together make an assignment. The assignment, the whole assignment, must be recorded. It must be recorded in the same manner as conveyances of real estate are recorded, *i. e.*, not among chattel mortgages, but in the other books. Upon the construction contended for by appellants, how is this assignment, composed of these two separate acts (*i. e.*, the appointment of the receiver and the chattel mortgage), to be acknowledged, and how is it to be recorded, for the statute contemplates that every voluntary assignment shall be acknowledged and recorded? The appellants come in under the winding up proceedings, prove their debts and accept their dividends. From this action they ought to be precluded from now averring or proving that this winding up proceeding was in fact part of a general assignment for the benefit of creditors. Having proved their debts in court, and thereby having become parties to this winding up proceeding, and having accepted dividends, they ought to be precluded from saying that there was no deed of trust in fact; there was no winding up proceeding; there was no receivership. Having accepted dividends under the receivership they ought now to be precluded from requiring Stewart to conduct this whole business as a voluntary assignment. If the deed of trust alone be a voluntary assignment, then it conveyed all the firm property, and the receiver had no right or title to any part of it. Appellants

affirm its validity by proving their debts and accepting their dividends.

If the deed of trust and the receivership proceedings together make a voluntary assignment, then all the proceedings are wrong from the beginning. But appellants proved their debts and took their dividends. They now ask this Court to say this receivership proceedings is not what it appears, but that it, with the deed of trust, make a voluntary assignment. This third question should be answered in the negative, and this will affirm the judgment.

All of which is respectfully submitted.

HENRY N. ESS,

Counsel for Respondents.

Office Supreme Court U.S.
FILED,
OCT 14 1889
JAMES H. MCKENNEY,
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IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNION NATIONAL BANK OF CHICAGO, AND OTHERS,
Appellants,

vs.

THE BANK OF KANSAS CITY, AND OTHERS,
Respondents.

Supplemental Brief for Respondents.

By HENRY N. ESS.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRS., 613 DELAWARE ST.
1889.

IN THE

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Respondents.

Supplemental Brief for Respondents.

Since preparing briefs in above cause other cases have been decided by this court, and the Supreme Court of Missouri.

One case is that of *White vs. Catzhonsen*, decided January 28, 1889, reported in Supreme Court Reporter, in volume 9, at pages 309, and following on page 311, the Illinois statute is quoted thus:

"Every provision in any assignment hereafter made in this state providing for the payment of one debt or liability in preference to another shall be void, and all debts and liabilities within the provisions of the assignment shall be paid pro rata from the assets thereof."

This is the language used in section 39, Revised Statutes of Missouri for 1855, quoted in our brief for respondents at the top of page 27.

A makes a voluntary assignment of all his property. The instrument is beyond question a voluntary assignment in form and effect. In it he provides to pay: First, costs and expenses; second, debt to B and interest in full; third, if anything remain then, a debt to C in full, with all interest, and if anything be left then a debt to D in full, with all interest.

Under this Missouri law, just like that of Illinois, as quoted, the preferences are avoided, and B, C and D are paid equally, but E, F and others not named get nothing.

This is the language of the statute (if we can understand plain English). Every provision providing for the payment of one debt in preference to another is void. This provision that B shall be paid first is void. All debts within the provisions of the assignment shall be paid equally, that is B, C and D are paid equally or ratably. But a person not named or provided for got nothing before this statute and gets nothing after it.

This is the decision of our Supreme Court in *Shopleigh vs. Baird*, 26 Mo. 325 *et seq.*

"This general designation of creditors was meant to be restricted to such as were named in the assignment," above, 26 Mo., at page 325.

Again: A makes a voluntary assignment. The instrument is an unquestioned voluntary as-

signment. The deed contains a provision that creditors, B, C and D, are to be paid first in full, and then the deed contains this: "When all said debts are paid in full, then hold the residue for the benefit of all my creditors, to be apportioned *pro rata* among them by the said trustee, and the remainder, if any, shall be paid to the party of the first part," the grantor. The property is not enough to pay B, C and D in full. There are other creditors; they get nothing; they are not provided for. This is the decision of the Supreme Court of Missouri in *Moury vs. Logan*, 31 Mo. at page 93 *et seq.*

The Missouri decisions are the opposite of those in Illinois as reported in *White vs. Cotzhousen*, decided in this court.

Since making the briefs in this cause, and in February or March, 1889, the Supreme Court of Missouri has rendered the decision in *Hargadine vs. Henderson*. It is reported in 97 Missouri Reports, at page 375 *et seq.*

Compare the instrument copied in *Martin vs. Houseman*, 14 Fed. Rep. 160 *et seq.*, with the instrument in this case (97 Mo.) 97 Mo. at pages 379–380, 1 and 2.

Martin vs. Houseman is the basis of all the decisions of the United States courts in Missouri. The decision is quoted in respondents' brief at pages 38–9.

Speaking of the language of section 354 of Missouri statute, the opinion says: "Was this intended to probibit a failing debtor from giving

preferences at all? I am inclined to think so." This is the basis of all the federal decisions on this statute.

"The Assignment Law of Missouri is not in letter or spirit a bankrupt or insolvent debtor's act," [97 Mo. 386]. The language of the court is that a debtor, though insolvent, may mortgage the whole of his property to one creditor to the exclusion of all others. The mortgage does not thereby become a voluntary assignment.

Does the mortgage made by Benedict, Malone & Co., under this Section 354, enure as a voluntary assignment. This is the second question in the certificate of division. In *Hargadine vs. Henderson*, 97 Mo. 375, *et seq.*, the deed of trust did not enure as a voluntary assignment. Will it do so in the case at bar?

"Its terms (*i. e.*, the terms of the Assignment Law of Missouri), in no way qualify the rule by which the character of this instrument is to be determined," [97 Mo. at 386].

To begin with and end with elementary principles the owner of property may convey it. This conveyance may be upon trusts. Such trusts may be to pay a debt; this is lawful; this makes a voluntary assignment. The trust may be to secure a debt; this makes a deed of trust or chattel mortgage; both trusts are lawful. A man may mortgage the whole of his property to one or more or all of his creditors; by general law this mortgage is valid. A man may assign all or part of his prop-

erty for the benefit of one or more or all of his creditors. The trusts, whether to secure or pay, are all valid and the intentions, as expressed in the deeds, will be carried out. This is general law.

By that general law a deed of trust or chattel mortgage is in no case a voluntary assignment.

By general law the owner of property may mortgage the whole of it to secure one creditor or all his creditors. He may mortgage part of it to secure all his creditors or part of them. The trust, as created by the party, is not changed by the general law.

By general law the owner may mortgage, 1st, all his property for all his creditors; 2d, all his property for part of his creditors; 3d, he may mortgage part of his property for all his creditors; or, 4th, part of his property for part of his creditors.

By general law the mortgage is in no case a voluntary assignment. By general law the owner may make a voluntary assignment (for this is one conveying upon trust to pay creditors) of all his property for all his creditors; 2d, or part of his property for all his creditors; 3d, or all his property for part of his creditors; or, 4th, part of his property for part of his creditors.

If the deed, whether of assignment or chattel mortgage, be of part only, no rule of general law extends it so as to embrace all.

Under Missouri law the owner may now convey part of his property by voluntary assignment.

No general law of Missouri (and no statute law) will extend it to embrace the whole.

Suppose the owner of forty lots makes a voluntary assignment of one lot only for the benefit of his creditors. It inures to the benefit of all creditors, but it don't embrace the other lots, either by general law or by statute.

Section 354 don't define what shall be deemed to be a voluntary assignment. It don't declare that a deed of trust shall, under any circumstances, be deemed a voluntary assignment.

But general common law does not declare that this deed of trust and the receivership constitute a voluntary assignment. The statute does not change that rule of the general law.

The decree should be affirmed.

All of which is respectfully submitted.

HENRY N. ESS,
For Respondents.

Office Supreme Court U. S.
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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

IN EQUITY.

THE UNION NATIONAL BANK OF CHICAGO, ET AL.,
Appellants,
vs.
THE BANK OF KANSAS CITY, ET AL.,
Respondents.

Statement, Brief and Argument

OF

WARNER, DEAN & HAGERMAN,

Solicitors for Respondents,

BANK OF KANSAS CITY and
CITIZENS NATIONAL BANK.

KANSAS CITY, MO.:
GERARD BROS. & WOODY, PRS., 613 DELAWARE ST.
1889.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

IN EQUITY.

THE UNION NATIONAL BANK OF CHICAGO, ET AL.,
Appellants,

vs.

THE BANK OF KANSAS CITY, ET AL.,
Respondents.

STATEMENT.

The firm of Benedict, Melone & Co. had for more than two years prior to February 16, 1882, been engaged in the wholesale grocery business at Kansas City, Mo.

The firm was composed of Charles H. Benedict, Richard A. Melone and James B. Melone. The capital was $15,000, of which amount Benedict had contributed $10,000, Richard A. Melone $2,500, and James B. Melone $2,500.

Benedict and Richard A. Melone both resided in Kansas City, Mo., and had entire charge of the firm business. James B. Melone resided at Macon, Mo., a town one hundred and fifty-two miles from Kansas City. At no time did he participate in the management or control of the business of the firm of which he was a member and in which, it will be observed, he relatively had but a small interest.

Upon this point, JAMES B. MELONE testified in behalf of complainants as follows:

"Q. Who were to assume active control and management of the business at Kansas City?

A. Well, Mr. Benedict was the active man of the firm in buying, and my brother had the financial part, or the books and collections.

Q. So that Benedict and R. A. Melone were to conduct the entire business here (Kansas City?)

A. Yes, sir.

Q. From the time that business commenced up to the time it closed in 1882, how many times were you in Kansas City to see after that business?

A. I was here three or four times." [Page 82 of the printed record.]

BENEDICT testified for complainants as follows:

"Q. Who conducted the business here?

A. Mr. (R. A.) Melone and myself.

Q. What portion did you look after?

A. Well I looked after the buying, and he looked after the general run of the business. Mr.

(R. A.) Melone kept the books; that was his business.

Q. Who looked after the making of notes, sending remittances and keeping the accounts?

A. Mr. (R. A.) Melone." [Page 138 of the printed record.]

James B. Melone was president of the Macon Savings Bank, of Macon, Mo., during all this time, and he was also a member of a co-partnership which was carrying on a banking business during the same time under the name of the Farmers and Traders Bank at said place; and he was also interested in and an officer of a company doing business there known as the Missouri Coal and Mining company.

On February 15, 1882, the Macon Savings Bank failed, and made a general assignment under the laws of Missouri, for the benefit of its creditors. On the same day the co-partnership doing business under the firm name of the Farmers and Traders Bank also failed and made an assignment for the benefit of its creditors. The Coal Mining company also failed at the same time. This failure of these two banking concerns and the Coal Mining company necessarily affected the firm of Benedict, Melone & Co.

First: Because by the constitution and laws of Missouri it is provided that if a banking officer consents to the reception of any deposits or the creation of any liability after the bank becomes insolvent

or is in failing circumstances, he becomes personally liable for such debt or liability.

Cons. of Mo. Art. XII, Sec. 27.
Rev. Stat. of Mo. page 167, Secs. 918, 919, page 237, Sec. 1350; page 61, Sec. 398, Subdiv. 12.

And Melone being president of and actively connected with the Macon Savings Bank at that time, became personally responsible for all the debts and liabilities created after the date when it could be shown that the bank was insolvent or in failing circumstances, and his property became liable to attachment and execution for such debts and liabilities.

And, Second; he being a member of the copartnership constituting the firm doing business under the firm name of the Farmers and Traders Bank of Macon, he was personally liable for all the debts of that banking concern.

To what extent he was personally liable by reason of his connection with the Coal Mining Co., does not appear from the record.

Under the laws of Missouri, the interest of a partner in partnership property, even though it be stock in trade, can be reached by attachment or execution levied upon the entire stock of the partnership.

Wiles vs. Maddox, 26 Mo. 77.

Accordingly, the moment the two banks mentioned failed, that moment the entire stock of Ben-

edict, Melone & Co., of Kansas City, could have been levied upon under the writ of attachment for the individual debts of James B. Melone. The other partners of the firm, under the practice which obtains in this State, could in the name of the entire firm have replevied the goods when attached, and in the replevin suit it would have been ascertained whether or not James B. Melone had any interest in the firm property after the payment of the firm debts.

Gilham vs. Karone, 45, Mo. 87
Rapp vs. Vogel, 45, Mo. (524).

The firm of Benedict, Melone & Co. accordingly stood in great danger of having its entire property seized and scattered under writs of attachment for the individual debts of James B. Melone, while the firm, as such, was, according to complainant's testimony, at this time perfectly solvent.

During the entire existence of the firm they had been carrying on a prosperous business at Kansas City. On the 1st of January previous an account had been taken of its condition and the net proceeds after allowing to its active members, C. H. Benedict and R. A. Melone, the amount they were authorized to draw from the business, amounted to something over $9,000 for the previous year. And on the 16th day of February, when these two persons were advised of the failure of James B. Melone, they considered their firm to be wholly solvent. Upon this point there is no dispute. In the testi-

mony of complainants, both Benedict and R. A. Melone, willing witnesses, too, in their behalf, testified that their firm had met with no losses of any consequence between the 1st of January, 1882, and the 16th of February following, and that their business had been prospering as usual.

R. A. MELONE, when interrogated by the counsel who were his legal advisers, on February 16, 1883, testified:

"Q. Now, in the morning when you first came to our office, don't you remember that we discussed as to the amount of your liabilities on the one side and the amount of your assets on the other?

A. Yes, sir; I remember that.

Q. How much was the net amount that would be left to the firm after the payment of these liabilities, as we then considered it?

A. Well, there was an amount shown by the books somewhere between $12,000 and $18,000, according to the way we figured it.

Q. You really expected that it would be all right—you really supposed there would be $18,000 left after the debts were all paid?

A. Yes, sir; that was the conclusion we came to." [Page 105.]

CHARLES H. BENEDICT, the principal manager of the firm, testified as follows:

"Q. Now, if there was any representations made at the time of the making of the deed of

trust and filing the petition for a receiver as to the solvency of the firm, you may state what they were?

A. Well, the parties asked me if I thought they would pay out, and I told them yes, I thought so, and I did think so.

Q. You were honest in that?

A. Yes, sir; that is one reason why I did not object to preferring the banks, because I thought there was plenty of money for paying them all. The banks might get their money a little quicker, but I thought there would be money enough to pay them all. That was my idea about it.

Q. You may state if you knew the condition of the firm at that time (Feb. 16, 1882)?

A. Yes, sir, as near as anybody could know its condition. I thought the firm's condition was all right. We had never had any trouble in meeting our obligations—we had always done that, and if it had not been for the bank's failure we would yet, I suppose.

The same witness further testified:

Q. Don't you know that inquiries were made there by Craig & Ess (his attorneys) as to the amount of your assets over and above all liabilities?

A. There might have been; I don't recollect now.

Q. Well, don't you remember, Mr. Benedict, that you complained?

A. I expect there was, from the fact that I thought the thing would pay out all right at the time.

Q. And that there would be a large surplus left for division among the partners?

A. Well, I don't recollect what was said about that, but I thought there would be plenty to pay off everybody, and we would have something left. [Page 142.]

Q. Didn't you then suppose that they would be paid in full, and a large surplus would be left?

A. Yes, sir.

Q. Don't you remember that we discussed the propriety of going ahead with the business and not having any receiver, and making any assgnment at all, but to ascertain his (J. B. Melone's) interest and pay it off?

A. Yes, sir; there was talk of that.

Q. There was no doubt entertained by anybody at that time that every creditor would be paid in full?

A. No, sir; that was the idea. [Page 144.]

Q. At the beginning of the year you made a statement to James B. Melone of the condition of the firm of Benedict, Melone & Co.?

A. Yes, sir.

Q. I understand that that statement exhibited the fact that the firm had made during the preceding year, clear of all losses, the sum of $9,000?

A. Yes, sir; that is what it did, according to the statement.

Q. Your bills payable are outstanding accounts?

A. Yes, sir.

Q. And when you made the estimate of the value of the stock, you endeavored to put upon it its then fair value?

A. Yes, sir.

Q. Without exaggeration?

A. Yes, sir.

Q. You didn't pad anything?

A. No, sir.

Q. And your invoice was a fair and honest invoice?

A. Yes, sir. [Page 149.]

Q. You expected that the debts would be paid in full, and your capital would come out unimpaired?

A. Yes, sir. [Page 147.]

* * * * * * *

Q. And you supposed R. A. Melone would have something coming to him from the business, did you, after all the debts were paid?

A. Yes, sir.

Q. Did you not expect at that time, you and R. A. Melone, that you would go on in your business here with the capital you expected to get out of the firm?

A. Well, if the thing had panned out as we thought it would, we would probably have done so."

JAMES B. MELONE, witness for complainants, testified as follows:

"Q. Did you know how the firm stood at that time (February 16, 1882)?

A. Only from a statement I had from my brother along about the first of January.

Q. Well, what was that—that they were solvent, in good condition, and doing well?

A. Well, I thought they were, sir, from their statement.

Q. You had no idea of quitting the business here (Kansas City) then?

A. No, sir.

Q. No idea, but all the debts of the firm would be paid?

A. No, sir.

Q. That statement informed you what the debts were?

A. I think it just gave a condensed statement as to what the liabilities were as per our books.

Q. What was the balance shown after all the liabilities were discharged—do you remember?

A. I don't remember; I remember about what it showed we had made that year, that is, the year preceding—which was about $9,000; that, according to the statement, was the net profits.

Q. That was up to January 1, 1882?

A. Yes, sir."

The exact condition of the firm, as shown by its books and reported by its active members, is

shown in the record, page 206. According to that statement the amount of the firm's assets, in excess of its liabilities, was $18,646.46. The bills payable, outside of those held by the defendant banks in Kansas City, amounted to $5,781.68. Of this last mentioned sum, some $5,000 was due to the Macon Savings Bank. If there were any other outstanding liabilities to the Macon Bank the books did not disclose them nor did Benedict apparently know anything concerning them, and both he and R. A. Melone were most earnest in their declarations that their firm was perfectly good for all its debts, and that a good surplus would be left for them to start with in business again.

It further appeared that the attorneys of Benedict, Melone & Co., to whom the matter of the failure of James B. Melone had been submitted, discussed the question as to whether it would be valid for the firm to make an assignment for the benefit of the creditors, when it was conceded that their assets were considerably more than sufficient to pay their liabilities. Their attorneys determined that it would be a fraud upon the firm creditors which would authorize an attachment upon their part, for the firm to make an assignment, upon the well established theory, no doubt, that if a debtor places his property beyond his control and the direct reach of his creditors by the ordinary processes of law, such acts are fraudulent as against his creditors.

Under this point R. A. Melone further testified:

"Q. Don't you remember that one reason why we didn't want to make an assignment was, there was no use to make an assignment if you had more than enough to pay your debts?

A. I know there was a good deal of talk one way and another how to make that the best way, and these things were mentioned; it was the best to do this way or that way, different reasons given. I can't remember them all; I paid attention to them at the time, but after the matter was concluded upon, it passed out of my mind; I can't remember the conversation that occurred there.

Q. Don't you know that that was the particular discussion of the entire day?

A. Well, I know there was one, and I remember the points of it?

Q. Don't you remember that it was there proposed to go ahead with your business anyhow, and not to make a deed of trust or assignment there?

A. Somebody asked that question; that they didn't see any use of it, and the question was answered about this way: That my brother having failed down there, that his creditors might come in and make attachment on his interest in the concern and get us into difficulties.

Q. And that is the only reason why you didn't go on in business?

A. Well, I don't know that it was the only reason. Of course all the reasons that were thought of then were discussed.

Q. Don't you remember that this was discussed: That if the assignment was made, Mr. J. B. Melone would have to sign it, and that we would have to make out the paper here, and it would have to be signed and acknowledged by you here, and then be sent out to Macon City to be signed and acknowledged by him there?

A. Yes, sir; there was something said about that, and I believe the lawyers who had it in charge said that to make an assignment it would be necessary to have James' signature. [Page 105.]

* * * * * * * *

Q. Don't you remember that we finally came to the conclusion that whatever he, James B. Melone, had there, we would bring into court under the statute to wind up the partnership and ascertain what he had; that it would then be in court, and his creditors could come and get it if they wanted it?

A. Yes, sir." [Page 106.]

On the evening of the 15th of February, 1882, James B. Melone sent a written communication or letter to his partners of the firm of Benedict, Melone & Co., at Kansas City, Missouri, which has been lost, but the contents of which appear to have been in substance a notification of the failure of the two Macon banks, in which he was interested,

Q. Did that tell you you must make an assignment?

A. No, sir; it did not say that we must make anassignment; it said that the bank had made an assignment, and that it would probably be necessary for us to do something of the kind here, and suggested Mr. Stewart as a suitable person to act in that capacity.

Q. Then the letter stated that it would be necessary to do something here?

A. Well, I don't know that the word "probably" was in there, but I don't think it said we must make an assignment; there was nothing mandatory in it.

Q. This letter was simply advisory, then?

A. Yes, sir; that is all."

STEWART, the receiver, testified that R. A. Melone came to his house on the morning of the 16th of February, 1882, and informed him of the failure of the Macon banks, and that J. B. Melone had stated that he desired his partners here to protect themselves; that is, he wanted to protect the mercantile creditors of Benedict, Melone & Co. in preference to having any attachments run by his creditors at Macon on this stock here (Kansas City). He expressed a wish for me to act; that is, to take charge of the stock in any manner I thought proper, as assignee or receiver, he didn't know what; that is, he wanted the stock out of their hands so it couldn't be attached by the creditors

down there. I told Melone that I would go down with him and see about the things. On the road down I asked him who his attorneys were, and he told me H. H. Craig; and on the road down I asked him the condition of his firm up here—how it stood. He told me the firm up here had made money all the time, and that they must be certainly $20,000 ahead after everything was paid. Well, we talked about the thing on the way down, and I told him if they were ahead so much it seemed that there might be some way. He said that his brother had sent up here and wanted some kind of an assignment made, and that he wanted to secure the creditors of Benedict, Melone & Co. in preference to the creditors of the bank coming up and attaching any of the stock of Benedict, Melone & Co.; and we talked about it a good deal, and I refused to take it. I told him that I was in delicate health and didn't want to be bothered with it; and he insisted on it; and when we got down to Craig's office we met Mr. Benedict down there, too, and he insisted, too, that I take charge of it in some capacity—that is, take the stock—so that I wouldn't be liable to any of the creditors of J. B. Melone or anybody else down at Macon—that is, the idea seemed to be that they wanted to protect the creditors up here first; but I still refused to have anything to do with it. Finally. Mr. Benedict and Mr. Melone both insisted so strongly on it that I asked them to let me go and consult my lawyers first. I told them that I wanted to go and consult Karnes

& Ess about it, as I knew them and didn't know Mr. Craig; and I came up to see Mr. Ess and told him just the way they had reported to me, exactly. Mr. Ess told me first he didn't think they ought to make any assignment or anything of the kind. That is my recollection about it." [Pages 193–194.]

Mr. Ess testified:

"J. B. Melone was not here. I didn't see how we could make a voluntary assignment unless he were here to sign it; the deed would have to be sent to Macon City for signature by him. I knew of no authority in the partners here to make a voluntary assignment." [Page 173.]

It is a curious fact that if this letter amounted to a request or a direction upon the part of James B. Melone that an assignment be made, it was not exhibited by Benedict to his attorneys, and that it was never heard of until between a year and two years after the date it was received. [Pages 126 and 139.]

That the letter was an authorization to the firm of Benedict, Melone & Co., by James B. Melone, as one of its members, to make a general assignment, will hardly be claimed; because it will be fully conceded that when the assignment was discussed by Benedict and R. A. Melone with their attorneys, one of the reasons distinctly given by all the witnesses why an assignment was not possible was the conceded want of authority of the two resident

partners to make it without the consent of their absent partner. If he had expressly authorized or directed an assignment, as complainants would contend for, this would have been impossible.

Upon this point BENEDICT testifies:

"Q. Do you recollect whether the matter of your power or authority to make an assignment here in the absence of James B. Melone was discussed after I had seen Wilson and got his consent to act in your interest?

A. I could not say when it was. I know we talked of that matter some time.

Q. And the conclusion reached was that the assignment would have to be sent to Macon City to be signed by James B. Melone?

A. Yes, sir."

R. A. MELONE, another witness for complainant, testified as hereinbefore shown in this matter.

STEWART testified to the same effect:

I don't know whether it was you (Ess) or Craig said that if an assignee was appointed, the papers would have to be sent down to Macon for J. B. Melone to sign them, and if sent down there, as soon as this deed of trust was recorded that creditors of J. B. Melone down there would run in ahead up here and attach property here and embarrass them on the rest of the stock; so, finally they agreed on having a receiver appointed, as the best way to get out of it.

The firm owed the Kansas City banks $19,000. Stewart, as a friend of the firm, had recommended it to one of the banks, to which they were indebted about $11,000. He felt that through his representations they had obtained this credit, and that he ought to secure this bank.

His testimony on this point is:

"And we went down there anyhow and had another talk about it, and I asked them at that time, said I: "Don't you owe the Kansas City Savings Association up here?" They told me yes. I told them I had recommended them to credit at that bank, and they said yes. "Well, now," said I, "if I do anything with this, I don't want to take it; but if I do, you say you have got a surplus of about $20,000?" And they also told me they expected to go into business again as soon as they could get rid of the complications at Macon. "Now," says I, "if your statement is true, you must protect this bank first. I won't act, unless you do, as receiver or assignee," or whatever it was, and they agreed to it; and at the same time they said they owed the Bank of Kansas City, and I told them that was all right, to protect the banks.

Q. What was your reason for giving this kind of advice?

A. I had two or three reasons; one was that the Valley Bank had failed a short time before and public confidence was impaired; another was, if they had this surplus of $20,000, knowing how gro-

cery men buy their goods, I knew that I could pay out, within from sixty to ninety days, not only the deed of trust, but also average payments on the balance of the debts by the time they were due; another reason was that they both told me—R. A. Melone and C. H. Benedict—that they expected to go into business again as soon as J. B. Melone's interest could be done away with; that they expected to go into business again here as soon as they could settle this thing up, and I told them if that was so, they ought to keep on the good side of the banks, and if they were solvent and had $20,000 ahead, they ought to pay the banks, as they would want accommodation afterwards, and if they were prompt with the banks in this case, they would extend them accommodations afterwards that they wouldn't otherwise."

But there was another matter to be considered. Such an exigency had arisen in the affairs of the partnership that it was necessary for the two resident partners to do what they ultimately did, to save the firm property from attachment.

R. A. Melone testified that the vice-president of the Kansas City Savings Association, one of the defendant banks secured, and to which his firm was then indebted in the sum of $11,000, met him early on the morning of the 16th of February, and insisted that he wanted his bank's debts secured, and that he created the impression on his mind that he

would run some attachments if he was not secured. [Page 89.]

Benedict testifies that he met Wilson early in the morning of the 16th of February, and, "We were owing them some money and he was pushing his claim and wanting to be protected, and we talked about the matter there for a long time. And Mr. Stewart said he insisted on our making the Kansas City Savings Association a preferred creditor; and I told him if we made them a preferred creditor, we would prefer the balance of them, treat all alike, the Bank of Kansas City and the Citizens National Bank." [Page 130.]

* * * * * * *

"Q. You may state what Mr. Wilson said on that day, if anything, in regard to the failure of the Macon Savings Bank, or what he desired.

A. He told me that he wanted his claim secured, and intimated that if it was not secured, he would run attachments on the store." [Page 137.]

Again:

"A. Well, we couldn't make an assignment, as I understood it, without the signature of J. B. Melone to the instrument, and that would take until the next day to procure, and we were fearing attachments on the concern." [Page 153.]

Wilson testified that as soon as he heard of the failure, "I went right down and interviewed the partners, and told them that my impression was, inasmuch as it was an unincorporated firm, they had

better secure me; that if they didn't secure me, I would attempt to secure myself before somebody else got the start, before a stampede of creditors got started towards them." [Page 161.]

The fraudulent manner in which the debt to this bank was created is further shown by the testimony of the same witness:

"He (R. A. Melone) wanted to open an account with us. We told him we would investigate the matter first. Mr. Stewart called to see if we would accept the account, and gave us what he supposed was a fair statement of their affairs, and I went to see them, and we had further conversation. They said they had $30,000, I think, capital; that they had been doing well and would show good large profits for the year's business—I can't give the amount, but it was a good round profit; and that they were not largely in debt to anyone; that the outside limits of discounts and credits would be about $10,000; that they would close up their account with the Bank of Kansas City, and give us the benefit of their business." [Page 160.]

It further appears that these statements as to their solvency were made but three or four months before their failure.

Mr. Ess, attorney for the Kansas City Savings Association, testified:

"I don't know whether I went to see Mr. Wilson or Mr. Wilson came to see me. At any rate, he

informed me that he wanted his debt secured—the debt of their bank—which was to be done either by attachment or deed of trust or mortgage, and for a good while I was looking around for grounds for attachment." [Page 172.]

Benedict and R. A. Melone, acting upon the advice of Stewart, and probably influenced by the threats of attachment made by Wilson, determined to execute a deed of trust, in which they conveyed to Stewart as trustee all of their firm assets to secure the payment of the $19,000 of indebtedness owing to defendant banks. This conveyance is in form simply an ordinary chattel mortgage, with power of sale in a third person, to secure the debts therein described, and in which sometimes possession of the property mortgaged is given to the person upon whom this power of sale is conferred at the time of its execution, and at other times, not until after default in the payment of the debt secured. If possession of the chattel property is not given, the mortgage must be recorded, otherwise not. [Rev. Sta. of Mo. 1879, Sec. 2503.]

The mortgage in question was delivered to Wilson, the vice-president of one of the banks, about three or four o'clock in the afternoon of the day of its execution, and the key was turned over and possession of the property was delivered at the same time. The mortgage was recorded late in the

same day, but, as we have shown, there was no necessity of doing this.

After the execution and delivery of the mortgage, Benedict, as complainant, instituted proceedings in equity against the Melones as defendants; and in his bill, or petition, as designated under our practice, cited that the partnership was one that was determinable at will, and that James B. Melone had become insolvent, and could no longer continue in the firm; he therefore prayed for the appointment of a receiver of the partnership property, and that the partnership property be sold, the partnership debts ascertained, and an account be taken of what might be due to each partner, and that the same be paid. [Page 201.]

This petition was presented to one of the state circuit judges at Kansas City. Mr. Craig, the attorney for the firm of Benedict, Melone & Co., entered the appearance of the defendants. Thereupon, Stewart was appointed receiver of the partnership property. He qualified the following day. These proceedings were not instituted until three or four hours after the execution of the mortgage.

That it was agreed to execute the chattel mortgage and make an application for the appointment of a receiver all at the same time, or that both were agreed upon at the same time, is not established by the testimony. The preponderance of the testimony is clearly with the defendant on this point.

Mr. Ess, the legal adviser of the parties at this time, testified as follows:

A. In the first part of the day and up to the afternoon there was no expressed purpose to do anything except execute the deed of trust to secure these banks. Until that was concluded we didn't know what we were going to do; I had not inquired as to what the parties would do after that. After the execution of the deed of trust, then I began to discuss the question, for the first time, as to what would further be done. We did just what the parties intended to do, and that was to file a bill in equity for the dissolution of the partnership and to have a receiver of the partnership property appointed, have the debts ascertained and paid, to take and state an account between the partners, and to pay over to each of the partners what he was entitled to. This is what he started out to do. The order of appointment was made by Judge Gill; that is of record. The bond was not made until the next day; I think the next day after the receiver was appointed—perhaps in the afternoon; there was one attachment for about $680, brought by Pratt, Brumback & Ferry, as attorneys for Plankinton & Armours, I believe [page 174.]

STEWART, when interrogated upon this point, testified:

"Q. Now, what was done after this deed of trust was delivered?

A. After the deed of trust was delivered it was a question what was best to do about the balance of it, that is, they knew they had more than

enough to pay off this deed of trust, and they consulted here as to the best means to dispose of the balance. They wanted to get their money out as quick as they could, so as to go into business; that is what they told me.

Q. What time was that conclusion reached—to have a receiver appointed?

A. I don't know; it was sometime in the afternoon; it was after the deed of trust was executed." [Pages 195 and 196.]

Complainant's witness, BENEDICT, testified in answer to questions prepounded:

"Q. Who acted as attorneys for the receiver at this time?

A. Karnes & Ess.

Q. Mr. Ess asked you, in the cross-examination, if the suit for a receivership was not determined upon after the deed of trust had been executed—please answer that question, now?

A. I believe it was; yes, sir.

Q. You are speaking of your recollection of it now or at that time?

A. I am speaking of my recollection of it now.

Q. Was the suit for the receivership determined upon before or after it was determined upon to make a deed of trust—I am not talking now of what was done first, but what was agreed upon.

A. Well, I am under the impression it was afterwards—soon afterwards, or at the same time, about; yes, sir, it was afterwards." [Page 154.]

It is true that this witness afterwards, when it was discovered that this testimony was disagreeable to the complainants, grew evasive, and his recollection suddenly became dim, cloudy and uncertain. But such was his answer before he discovered that it was liable to injure complainant's case. On re-examination, however, by the defendant's counsel, he was forced to go back to his original testimony, and testified:

"Q. Well, R. A. Melone, yourself, Mr. Stewart and Mr. Ess first agreed upon one thing, and that was that the banks in Kansas City had better be preferred?

A. Yes, sir.

Q. And then the matter came up, after that had been done, what should be next done with the property to protect it from attachments, and it was finally determined on by Mr. Ess, after consulting authorities, that you had better go into court and have a receiver appointed to wind up the affairs of the partnership and ascertain J. B. Melone's interest—now, is that not correct?

A. Well, you have got it all; you cover the whole ground; that is about it." [Pages 154 and 155.]

It is true that Wilson, vice-president of the defendant Bank of Commerce, then the Kansas City Savings Association, had heard on the morning of the 16th of the failure of the Macon banks, and fearing that it would endanger the collection of the debt to his bank, amounting, as stated, to

some $11,000, he had threatened to attach the firm's property for his debt if not immediately secured. And, as matters subsequently turned out, and will be shown herein, the attachment could undoubtedly have been maintained against the firm by all of the Kansas City banks, because of the fraudulent creation of the debts secured by the chattel mortgage, if the subsequent conduct of Benedict and Melone was in all respects honest.

Mr. Ess was the attorney of the last mentioned bank. After that bank was secured by the chattel mortgage and it had been delivered, he was requested to advise with Mr. Craig, the firm's lawyer, as to what should be done next. This he declined to do until he had first consulted with the officers of the bank that he had been representing. He went out and secured their consent and came back, and the proceedings for the dissolution of the partnership and the appointment of a receiver were thereupon canvassed and undertaken. This evidence is wholly uncontradicted:

"After the deed of trust was delivered, Mr. Benedict told me he wanted us to assist in their business. It may be that Mr. Melone made the same remark. I told him I couldn't do so unless the Kansas City Savings Association would consent; that I was willing to do so by their consent. I immediately started to the bank to get their consent to act or to get their refusal to acting. When I got there the bank was closed. I tapped on the window and the door was opened, and I stated to Mr. Wil-

son, and I believe to Mr. White, that their debt had been secured, and that now the parties wanted me to act in their interest for something further to be done, I didn't know what.

"Mr. Wilson or Mr. White said that they had no objection to my acting, and thereupon I returned to our office, and so informed Mr. Benedict and Mr. Melone. They seemed still inclined to make a voluntary assignment. I made further inquiries as to their debts and liabilities, and, after making due allowance, they thought their capital, after all their debts would be paid, including the bank debts here, would be from $18,000 to $20,000. James B. Melone wasn't here. I didn't see how we could make a voluntary assignment unless he were here to sign the deed. The deed would have to be sent to Macon City for signature by him. I knew of no authority in the partners here to make a voluntary assignment for him.

"I am now telling what took place in our office. The matter of the assignment was discussed and the parties concluded not to make an assignment. One reason for it was that they would have to send the deed to Macon City to be signed and acknowledged and another objection was that a solvent firm would have no business to make an assignment; and if they did there might be some question whether it wouldn't be fraudulent as to creditors, as tending to delay them; another was, that the principal thing they wanted to do was to get rid of James B. Melone, and they couldn't do that under a voluntary

assignment. And then I asked them as to the terms of the partnership, and the solvency of James B. Melone was discussed. I didn't know whether there could be any dissolution of the partnership at all. I inquired for written articles of partnership; as to how long the partnership was to run. We were informed that the partnership was at will; that there was no definite time that it was to continue. Under such circumstances we thought the better plan would be, and we so recommended the parties, that as James B. Melone had likely become insolvent, and as the partnership was at will, it could be dissolved at any time; that Mr. Benedict could file a suit for the dissolution of the partnership, and could have a receiver appointed to take charge of the property; that the debts of the partnership could be ascertained and paid in that way, and the principal thing they wanted to accomplish could be done, and that was to ascertain the interest of James B. Melone and pay it over. That interest would be in court, and if any of James B. Melone's creditors in Macon or elsewhere wanted to get it they could come into court and do so. We were aiming all the time to avoid any delay and to avoid any sacrifice of the property, and to avoid any appearance of anything wrong." [Pages 173 and 174.]

Mr. Ess was interrogated as to whether a receiver had been agreed upon when he went to the Kansas City Savings Association to obtain the con-

sent of its officers to act for Melone. His answer was as follows:

"I certainly didn't tell him (Mr. Wilson, vice-president) that we had resolved upon having a receiver appointed, because we hadn't done it; it wasn't a fact. I told him they wanted us to act in their interest in getting rid of the interest of James B. Malone, if anything further was necessary to be done at all." [Page 182.]

Stewart took charge of the property, and on March 8, 1882, he paid the defendant banks the amount of the indebtedness secured by their chattel mortgage.

In the meantime, James B. Melone had been indicted in his county for felony, the charge being that he had consented to the taking of money from its citizens after he knew that the bank had become insolvent and was in a failing condition. Then there appeared for the first time claims against Benedict, Melone & Co., of which apparently nothing was ever known before; they aggregated to the sum of $50,000. They were presented to the receiver for allowance, and he declined to allow them, or the greater part of them. They were referred to the court, and, notwithstanding the declarations made by Benedict & Melone at the time the chattel mortgage was given as to the condition of their debts, they were allowed. It is but just to say, however, that some of this paper had been given for the accommodation of the Macon banks, and

had passed into the hands of innocent purchasers for value, but there was also a large portion of the paper presented for allowance for money alleged to have been actually advanced to the firm by the Macon Savings Bank. These claims were allowed by the court upon the testimony of Benedict and the Melones.

Of all this unknown indebtedness only $5,000 of it appeared on the books of the firm, as heretofore shown.

It is apparent from the record in this case that if Benedict and R. A. Malone had testified when these unknown claims were presented to the court for allowance, as they have testified in this case, a large proportion of them would never have been admitted as valid claims against the firm's property. But be this so or not, this testimony is referred to simply to show that when the mortgage was taken and a receiver appointed, that neither of these acts were in contemplation of insolvency, though by judicial action the firm was subsequently made insolvent. If any legal effect is to be allowed to the intention of the parties growing out of what was done and understood at the time, nothing was done in contemplation of insolvency. The purpose of these two separate transactions was to first secure the defendant banks, and, second, to eliminate the interest of J. B. Melone from the rest of the firm and turn it over to his creditors, in order that the other two members of the firm might continue in business unmolested by them. Certain it is that

the defendant banks supposed, and had every reason to believe, that when they obtained the chattel mortgage as security for their debt, that they were receiving it from a concern which was wholly solvent. Neither the receiver nor the legal adviser, nor probably Benedict discovered until many days after the mortgage was given that there was any doubt concerning the solvency of the firm. Mr. Ess testified:

"We continued to think that the firm would have at least from $18,000 to $20,000 surplus for division among the partners until some time in March; it must have been in the middle or the latter part of March."

"Q. Mr. Ess, state what information you had concerning the indebtedness of Benedict, Melone & Co. to the banks of Macon City, and the other debts for which they were bound outside of those for goods purchased and money borrowed from the banks named in Kansas City?

A. We did not at any time have any knowledge of any debts to the Macon banks except $5,000 in amount that was on the books of Benedict, Melone & Co. Debts afterwards came in from that concern to the extent of about $50,000. This is a matter of record.

Q. What information did you have as to any accommodation paper for which the firm of Benedict, Melone & Co. were bound as accommodation acceptors, makers or endorsers?

A. We didn't have any at that time, and didn't have for a month or six weeks after the deed of trust was made, and at that time and for a long time afterwards we knew nothing about it. We defended the suits brought by the aasignees of the Macon banks on the ground that there was no consideration for it at all; it was not on the books here, and we knew nothing about it." [Page 175].

BENEDICT testifies:

"Q. How long after Februaay 16, 1882, did you continue to believe that the assets of the firm of Benedict, Melone & Co. would pay all their debts and liabilities and leave a surplus for division among the partners?

A. Well, I supposed so for some time afterwards, but I don't know how long, but until the matter commenced to show up.

Q. Wasn't it as much as a month afterwards?

A. I expect it was. [Page 146].

Q. Your books didn't show and do not show any account at all with the Macon Savings Bank or the Farmers and Traders Bank?

A. It shows an account with the Macon Savings Bank; I think it does.

Q. But it doesn t show an account to the extent they got judgment?

A. No, sir.

Q. It don't show anything at all with reference to the Farmers and Traders Bank?

A. I think the books show only about $4,500 (in all).

Q. It is a small amount compared to what they got judgment for?

A. Yes, sir." [Page 146].

Stewart testified that on March 8, when he paid the banks, that there would be a surplus of from eighteen to twenty thousand dollars, and didn't at that time collect the fees he was entitled to in the chattel mortgage. [Page 200; see, also, page 199.]

It is manifest that it became necessary for James B. Melone to show in the criminial proceedings that his banks were not, to his knowledge, insolvent or in failing condition when he permitted them to contract liabilities; and hence these immense claims against his own firm were produced to make a showing of assets in order to save him from the penitentiary.

But there is another side to this case which, in our judgment, ought to be considered in the determination of the first question concerning which there was a certificate of division. It is true that James B. Melone never authorized the mortgage in question. But it is true that Melone lived in another part of the state as shown, had no active control of the affairs of the firm, and when he himself had failed he gave no specific direction as to what should be done. And it is further clear that immediately after the banks were preferred he was notified of this fact, and never until these proceedings were commenced, March 23, 1883, thereafter, did he

complain or object to what had been done by the firm in the firm name, and for what apparently was, in the judgment of his co-partners, for its best interests at the time.

J. B. MELONE testified:

"Q. Well, after you wrote the letter on the night of the 15th of February, 1882, did you receive any letters from Benedict or Melone?

A. I received a letter from my brother, as I stated here, a few days after that, stating that they had made an assignment, and that they had made the banks here (Kansas City) preferred creditors. That is the only letter I remember of having received from that for months after that.

Q. How long was that after you wrote the letter on the night of the 15th of February, 1882?

A. Well, my recollection is that it was five or six days.

Q. What did you do after you had been informed that the banks of Kansas City had been preferred?

A. I didn't do anything; I said nothing further about it.

Q. You made no reply to that letter to Mr. Melone, did you?

A. I think not, sir. [Page 87.]

* * * * * * *

Q. Do you recollect seeing an announcement made in the papers of the failure of Benedict, Melone & Co., of Kansas City?

A. I think I saw that in a St. Louis paper.

Q. That set out at the time what had been done; that they had failed and a receiver had been appointed?

A. I suppose so; I don't remember to have read it carefully; I thought I knew what had been done, and I didn't give that much attention.

Q. You knew that Mr. Stewart had been appointed receiver?

A. Yes, sir.

Q. By the court here previous to that time?

A. I knew that he had been appointed in some capacity to wind up the affairs of the firm from the letter received from my brother.

Q. Either as assignee or receiver?

A. Yes, sir. [Page 88.]

* * * * * * *

Q. You had been informed by your brother that there had been a preference given by the firm to the banks here at Kansas City?

A. Yes, sir; I understood that.

Q. And that Mr. Stewart was either receiver or assignee?

A. Yes, sir; that is about my understanding of it.

Q. But you didn't inquire into the nature or the manner in which the preference had been given at that time, or at any time subsequent?

A. No, sir.

Q. You didn't even answer their letter?

A. I don't remember to have done so.

Q. Of course, then, you made no objections?

A. None, at that time.

Q. You never made any objection in the court to the appointment of Mr. Stewart as receiver?

A. No, sir. [Page 89.]

Q. Were you and your brother on friendly terms?

A. Yes, sir.

* * * * * * *

Q. He would not undertake to deceive you in any transaction here?

A. No, sir; not intentionally.

Q. He would tell you the truth about the matter.

A. I think so.

Q. Now, when he wrote you that letter, you assumed that he told you the truth about the condition of things here as he understood them at the time?

A. Yes, sir.

Q. He didn't misrepresent the state of affairs here, or the transactions had by him and Mr. Benedict, who was representing the firm here?

A. No, sir; I think not.

Q. You knew of no reason, then, nor do you now, why he should misinform you as to what had been done here?

A. No, sir.

Q. In the ordinary affairs of life, you would

be willing to trust his judgment and assent to it in anything he did in your behalf?

A. Yes, sir.

Q. And he with you?

A. I think so." [Page 90.]

R. A. MELONE testified.

"Q. When that deed of trust was read, you understood it, didn't you?

A. Yes, sir; I understood it.

Q. At that time it was perfectly apparent to you wasn't it?

A. Yes, sir.

Q. And you signed it willingly and knowingly?

A. Yes, sir.

Q. And done it on the same day that proceedings were instituted in the circuit court for the appointment of a receiver?

A. I understood there was a petition to dissolve the partnership or something of the kind.

Q. You understood what was in the petition at the time you signed it?

A. Yes, sir; I understood the general purport of it.

Q. Were you one of the complainants or defendants in that suit?

A. I was one of the defendants.

* * * * * * *

Q. You didn't hear at that time, either by

Craig, or the court, or Karnes & Ess, this paper called an assignment?

A. I didn't hear anything about it.

Q. You had understood that Mr. Stewart was appointed as receiver?

A. Yes, sir.

Q. You also understood that he was trustee in the deed of trust?

A. Yes, sir; for the benefit——

Q. Of these banks?

A. Yes, sir.

Q. Now, when you wrote to your brother, you wrote your understanding of the thing, what it was at the time?

A. Yes, sir.

Q. You had no reason for prevaricating or misrepresenting the situation?

A. No, sir; I did not do it as far as I know.

Q. You stated to him what had been done, to the best of your knowledge and ability?

A. Yes, sir. [Pages 109 and 110.]

* * * * * * *

Q. Don't you remember that this was discussed: That if an assignment was made, Mr. J. B. Melone would have to sign it, and that we have to make out the paper here and have it signed and acknowledged by you here, and then send it to Macon City to be signed and acknowledged by him there?

A. Yes, sir; there was something said about that, and I believe the lawyers who had it in charge

said that to make an assignment it would be necessary to have James' signature. [Page 105.]

* * * * * * *

Q. If you understood at the time that Mr. Stewart was receiver, you so wrote, did you not?

A. I expect I did, sir; I can't say anything about what I said in that letter, now. The point I made in the letter was simply this, if I remember right: The question came up in some way—somebody had written to me from down there, I think it was the assignee of the Macon Savings Bank—and he wanted to know what we did down here, and I wrote to him and told him as I understood the matter then, as I understand it now, and I wrote the same thing to my brother, that I understood that we had made a preference of these creditors here. I may have called it an assignment; I suppose quite likely I did. I told him that we had preferred the three banks here, and the balance of the property was to go to the benefit of the creditors. That is what I understood the proceeding was at the time, and that is what I understand yet.

Q. But if you heard nothing about an assignment at the time, and if it was understood at the time that an assignment could not be made because J. B. Melone was not there, and because it would be necessary, according to the advice of your attorney at the time, to have his signature before an assignment would be valid, and it was, therefore, necessary to go into court and have a receiver appointed, instead of having an assignment, could you

have written concerning an assigument when you were expressly told at the time by your attorneys that an assignment was impossible?

A. Yes, sir; I may have written him that.

Q. You think that although you were told that an assignment was impossible, and that something would have to be done instead of making an assignment, that still you wrote that an assignment was made?

A. I don't know that I did, sir; but I say that it is very likely that I may have done so.

Q. You, however, did, as far as your recollection is concerned; you did attempt to express and represent in your letter to him and to your brother the correct status of things here at that time?

A. Yes, sir; that is what I tried to do. [Page 110.]

Q. You have been a bookkeeper, as well as a general business man?

A. Yes, sir; I have kept books.

Q. You aim to be accurate in your statement of things?

A. Yes, sir.

Q. If you advised them of this preference being made to the banks, don't you think you must have advised them of the manner in which it was made—that it was made by a deed of trust on the property?

A. Well, I may have done so; I don't know that I did it, sir; I may have told them simply this

about the matter: That we had made an assignment, or whatever you might call it, and perhaps more than likely I did call it an assignment; I don't know whether I did or not; I say I may have done so, or I may have said it was something else; but I told him we had preferred the banks here, and probably gave them some reasons why we did do it, and one of the reasons was, as I have told you before, that Mr. Stewart being the party selected by my brother in the first place, and being acquainted with him I preferred him to do it, and he wanted those banks, one of them especially, preferred because of matters that had occurred before. I felt like accommodating him, and I wanted him to act; and for the further reason that I wanted to be on as good terms with these institutions as possible; I expected to live in Kansas City at the time, and have been living here since until a short time ago. [Page 112.]

* * * * * * *

Q. Now, you think you wrote but two or three letters to your brother and partner liable with you for an amount over a hundred thousand dollars concerning the proceedings that were being had here in relation to the affairs of Benedict, Melone & Co., from the time Mr. Stewart was appointed receiver until he came up here?

A. I don't know exactly how many; it wasn't a great many.

Q. Mr. (J. B.) Melone has never objected, in

any shape or form to this appointment of a receiver, has he?

A. He has never objected to me.

Q. Nor to the execution of the deed of trust to the banks?

A. Not that I know of, sir.

Q. He has never complained in any shape or form, and does not now?

A. He has not, as far as I know."

At this point the witness for complainant began to discover that he was not testifying to suit the complainants and began to qualify what he had already sworn to.

When interrogated further he testified in this manner:

"Q. On the contrary, he has approved your action, has he not?

A. I suppose so; I don't know.

Q. You never heard of any complaint from him?

A. He may have written something to me about it at the time. It strikes me he probably did in one letter I got from him. If I recollect right, he said in one letter to me that I ought to have made a straight out assignment without any preferred creditors.

Q. But he didn't object to it?

A. No, sir; I don't think he made any more objection than that.

Q. You advised him that you did the best you could under the circumstances?

A. I think I did.

Q. And you think so yet?

A. Yes, sir." [Page 113.]

Later on he testifies:

"Q. So you understood that you represented him, and that he had sustained you in what you did?

A. I understand he has never made any objections to me.

Q. Did you ever make any objections to this matter?

A. I never did." [Page 114.]

There was then an adjournment, and this same witness was again recalled at the instance of the complainants, and he then discovered that his brother had made some kind of a complaint. When questioned by complainants' counsel as to the letter just referred to, he said:

Q. Was that an answer to your letter?

A. It was an answer to a letter I had written to him in regard to what had been done here.

Q. Now, give the contents of it as nearly as you can.

A. I think the portion alluding to that was about to this effect: That he understood from what he saw in the papers, or from what he heard, that we had not made any assignment at all, and we had worked a great injustice to him. I don't know that this is the language of the letter exactly, but that is the purport of it.

Q. What further was there on that subject, if anything?

A. I don't know that I can give you anything further than that, because it has been so long that there may have been something more.

Q. To refresh your memory—did he express any acquiescence or dissent?

A. Well, I inferred from what he said that he was not very well pleased with the matter as it stood, as it was a detriment to his interest down there." [Page 115.]

If any credence should be allowed to this testimony, it is apparent that James B. Melone understood that the banks had been preferred, and that there had been no assignment.

On cross-examination, the same witness testified:

"Q. Your brother stated in this letter that he had learned that you had not made an assignment, but had had a receiver appointed?

A. He didn't say anything about a receiver. My recollection is that he said we hadn't made an assignment at all.

Q. And he had learned that from some newspapers?

A. Yes, sir, or from what some one had told him. There were quite a number of rumors, you know. If my memory serves me, this he said he got from the newspapers —what he had learned.

Q. He didn't request you in any way to present any objections, did he?

A. I don't think he did.

Q. He didn't make any objections—he simply suggested that you might have pursued another course which would have been preferable?

A. His objection is what I have stated.

Q. Then it was merely a criticism on your conduct?

Q. He said, I think, that it was detrimental to him, and that he would have preferred that we had pursued another course.

Q. So that it amounted to merely a criticism on your conduct?

A. His objection was that we had not properly pursued his suggestion in his former letter; that is, the first letter written to me.

Q. Now, then, as a matter of fact, is not what you stated yesterday in your examination a true view of the case—that he never did make any objection, but simply criticised your conduct, but expressed himself as thinking you might have pursued a course more wise than the one you did take —is not that it?

A. Well, my construction of it is about that." [Page 120.]

BENEDICT testified:

"Q. You felt that the management of the business here was entirely in the hands of yourself and R. A. Melone, and felt that any action you

might take in the premises, according to your best judgment, would be confirmed by J. B. Melone?

A. Yes, sir.

Q. And when he was informed of it he made no objections to anything you did in the matter by preferring the banks here in the deed of trust and having a receiver appointed?

A. No, sir; he never made any objection.

Q. He has never complained to you that you did not act according to your best judgment?

A. No, sir.

Q. He has never even condemned it?

A. No, sir.

It will be observed that James B. Melone testified that after he received the letter mentioned that he didn't make any objection at that time. His brother first testified to the same effect, but afterwards undertook to qualify it. It is perfectly clear that he knew of the preference given to the banks, and it must also be equally clear that he knew that no assignment had been made.

Notwithstanding the foregoing, we have the following remarkable testimony delivered by James B. Melone in his examination in chief by complainant:

"Q. State if you in any manner assented to the execution of the instrument as a member of the firm of Benedict, Melone & Co., or otherwise?

A. Well, I never assented to it; I never knew anything about it for a long time afterwards.

Q. Have you ever at any time since then assented to it?

A. I never said anything about it, either yea or nay." [Page 80.]

It will not be claimed that the defendant banks, Stewart, or Ess, who had been employed as counsel for Stewart, were at any time ever notified by any member of the firm that James B. Melone did not fully acquiesce in the action taken by his copartners in Kansas City on February 16, 1882, relative to the execution and delivery of the mortgage.

Mr. Ess testifies that he met J. B. Melone some months or longer after in Kansas City and had a conversation with him. And then this question was propounded to the witness:

Q. I will ask you to state whether he then or at any time ever claimed that the deed of trust should have the effect of an assignment?

A. I never heard any objections from J. B. Melone as to what had been done at all in any way.

Q. State whether he at any time in your presence, or to your knowledge, has ever repudiated the action of his partners in the execution of this deed of trust to the banks of Kansas City?

A. I never knew of his taking any action in that respect at all. I don't think that he has ever done anything." [Page 177.]

The parties who executed the chattel mortgage

and instituted the proceedings for the appointment of a receiver did not intend to make a general assignment. They intended to do precisely what was done. This is well established by the evidence.

BENEDICT testifies:

"Q. The final conclusion that you arrived at was that no assignment should be made?

A. Yes, sir.

Q. That was your intention?

A. That was the final conclusion.

Q. Not to make an assignment?

A. Not to make an assignment. [Page 146.]

Again:

"A. Well, after we came to the conclusion to prefer these banks, we didn't want to make an assignments, I don't suppose. We wanted to do just like we did do." [Page 132.]

Mr. Ess testified:

"A. I have never heard from James B. Melone or Richard A. Melone or Charles H. Benedict any intimation that they wanted anything different done from what was done. Richard A. Melone and Charles H. Benedict determined that they didn't want an assignment. That question was brought up and settled. I have never heard that there was anything wrong about that. [Page 178.

The record discloses another fact to which we desire to call the attention of the court: Several, if not all, of the parties complainant began suits by attachment against Benedict, Melone & Co. As

soon as it became doubtful whether the firm would pay its debts in full, they undertook to take all of the firm property by garnishment proceedings commenced against Stewart, trustee and receiver. Their attachments were based upon the ground that the chattel mortgage and proceedings to wind up the partnership were fraudulent. Pleas in abatement to the attachments were filed, some of which were tried and defeated, and those not tried were afterwards dismissed by the attaching creditors. [Pages 210, 211, 212, 214, 215, 216, 217.] Afterwards, all the complainants, finding that they could not defeat the mortgage and secure for themselves the payment of their debts in full at the expense of the defendant banks, presented their claims to the receiver for allowance, and have collected from him thirty-three and one-third per cent of the entire amount of their claims under the proceedings to wind up the partnership. After they had done this, they then waited until a year and more had elapsed from the time of the execution of the chattel mortgage and the appointment of Stewart as receiver before commencing these proceedings to have the mortgage declared an assignment for the benefit of all the creditors of Benedict, Melone & Co., notwithstanding the fact that their first act was to attack and endeavor to destroy those acts and proceedings under which they are now asking benefits. If the chattel mortgage was an assignment, it was such on the day when they undertook to destroy it and get for themselves a preference

which they are now seeking to deny to the defendants. They have been claiming against these proceedings, and are now seeking to claim under them.

It might be proper to add that James B. Melone was under indictment at the time that he was testifying in this case. This may tend to explain some of the peculiarities of his testimony. [Page 88.]

At the expense of being very tedious, we think that we can fairly assert that we have established:

First. That Benedict, Melone & Co. had at and prior to the time of the execution and delivery of the chattel mortgage in question the entire management and control of the firm property, and that the other member of the firm resided in another and distant part of the same state, and was there wholly engaged in other business. And that said mortgage was given in good faith to protect the firm property from attachments which not only the individual creditors of J. B. Melone, but also the firm creditors, threatened to levy.

Second. That at the time said mortgage was given, the firm of Benedict, Melone & Co. was supposed to be solvent, and understood to be such by the defendant banks.

Third. That no express or direct request or authority was ever given by James B. Melone to the other members of his firm that a general assignment should be made, but that he left to them the question of determining how the creditors of Bene-

dict, Melone & Co. should be protected against attachments that might be brought against the firm assets by his individual creditors. That what he did write was simply suggestive, and too uncertain to amount to a request or authority.

Fourth. That the execution of the chattel mortgage and the proceedings which were instituted to wind up the partnership were not contemporaneously agreed upon and had, but that the mortgage was executed and delivered before the proceedings to wind up the partnership and appoint a receiver were determined upon, and that the latter proceeding was not determined upon and concluded for several hours after the execution and delivery of the mortgage.

Fifth. That after the execution of the mortgage and appointment of a receiver, James B. Melone never repudiated the action of his co-partners in respect to either of these two transactions, and that he was distinctly informed of the preference given to the banks immediately after it had been furnished; and instead of promptly repudiating the acts of his co-partners done in his name and in his behalf, he acquiesced in them until these proceedings were instituted.

Sixth. That the complainants, or the majority of them, first commenced suits by attachment against Benedict, Melone & Co. That, failing in this, they came in under the proceedings to wind up the partnership, collected dividends from the

receiver, and not until the 23d day of March, 1883, did they institute this action to have those proceedings declared to be an assignment for their benefit, and moreover, not until after they had attacked and sought to destroy the same proceedings, in order to thereby secure a preference for themselves at the expense of all the other creditors of Benedict, Melone & Co.

Seventh. That the parties who executed and delivered the chattel mortgage and caused the proceedings to wind up the partnership to be commenced never intended that they should have any other effect than what they purport to have. Nor did the defendant banks, when they abandoned their rights to secure preference by attachment proceedings and obtain a preference by a chattel mortgage, have knowledge that the giving of the chattel mortgage was to be followed by the proceedings to wind up the co-partnership; nor did they have any knowledge at the time that the firm of Benedict, Melone & Co., as such, was insolvent.

II.

CERTIFICATE OF DIVISION OF OPINION.

Upon the hearing of this cause, the justice of the circuit court and the judge of the district court were opposed in opinion, and the following certificate of division of opinion was filed:

1. Is this instrument of writing in this case, called a deed of trust, which we find, as a matter of fact, conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart, as trustee, as surety for the banks therein named, void for want of the assent of James B. Melone, one of the partners, which was never given to that transfer?

2. As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under Section 354 of the Revised Statutes of Missouri of 1879?

3. Does the making of that deed of trust and the appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the proceeding to administer the assets of the insolvent partnership, to which the banks and Stewart and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors and require the receiver to administer the funds in his hands in that manner?

BRIEF.

THE VALIDITY OF THE MORTGAGE.

First. Do two partners, who have the entire control and management of the business and property of a mercantile firm, and who have furnished four-fifths of the firm capital, have authority to execute a chattel mortgage upon all the firm property to secure one or more debts of the firm without first obtaining the consent of an absent and non-resident co-partner, and especially when it appears necessary to execute such mortgage in order to save the firm property from attachments by the creditors to whom the security is given?

The proposition that a partner has the right to pledge, mortgage and sell the entire property of a commercial firm without the consent of his co-partner has received the sanction of the highest courts and text writers in this country.

In *Tapley vs. Butterfield*, 1 Met. 515, the facts were that Blaisdell, "one of the partners, in the absence of the other partner, and without his knowledge, executed to the plaintiff a mortgage of the goods in question, being the whole stock in trade of the firm," to secure a particular creditor. The validity of this mortgage was denied. From the brief of one of the counsel it can be fairly inferred

that the absence of the non-consenting partner was only temporary. The decision is by Chief Justice SHAW, and, in determining the case, he held that not only can a partner dispose of all the partnership goods in the usual course of trade, but it is also "within the scope of partnership authority to pay the debts of the firm and apply the assets of the firm for that purpose, he being authorized to sell the goods to raise money to pay their debts; he may apply the goods directly to the payment of the debts; and, according to the exigencies of the occasion, he may pledge the partnership goods to raise money to pay the debts of the firm. To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation.

"But, considering that the authority of selling and pledging the personal property is within the scope of partnership power, and may be done by either partner, and considering that it may be done without deed, the court are of opinion that such a mortgage, made by one partner in the absence of the other, although unnecessarily made by deed, was binding upon the property, and constituted a valid lien upon the property, which the plaintiff may avail himself of. *Anderson vs. Tompkins*, 1 Brock. 456; *Deckard vs. Case*, 5 Watts. 22."

In *Patch vs. Wheatland*, 8 Allen, 102, it is held that "the power of one co-partner to make and execute a valid transfer, either absolute or conditional, of a ship, vessel or other personal prop-

erty belonging to the firm, is clear and unquestionable, and has often been recognized and affirmed by this court. *Lamb vs. Durant*, 12 Mass. 54; *Tapley vs. Butterfield*, 1 Met. 515; *Milton vs. Mosher*, 7 Met. 244."

In *Froome vs. Jones*, 13 Iowa, 475, the plaintiff sued the defendant in trespass for seizing and conveying away certain personal property to which the plaintiff claimed title by virtue of a chattel mortgage executed by one of the partners. The defendant justified by alleging that he levied upon the property as the firm property under certain writs of attachment issued at the instance of creditors of the firm. It appears from the brief of counsel and the opinion of the court and the syllabus of the reporter that the mortgage covered all, or substantially all, of the firm property, and also that the firm was insolvent at the time. In support of the validity of the mortgage, the counsel, for the mortgagee, cited *Tapley vs. Butterfield*, 1 Met. 515, and the other Massachusetts cases. The court in deciding the case said:

"The question as to the rights of the other partner can be raised only by some person who claims through him. There can be no doubt as to the rule that as between creditors, one partner may sell or dispose of partnership property to secure partnership debts. See 12 Mass. 476, and cases cited by counsel."

In *Woodruff vs. King*, 47 Wis. 262, one of the partners executed a chattel mortgage to secure

a firm debt without the consent of his co-partner, and it would appear from the facts in the case that his co-partner was accessible when the mortgage was executed. The court says:

"The point made that Charles E. Woodruff, one of the co-partnership of Woodruff & Grist, could not so execute the chattel mortgage, even to secure a partnership debt, without the consent of his co-partner, is not well taken. The authorities upon the direct question, here presented, are nearly if not quite, uniform in favor of such right. Herman on Chattel Mortgages, Par. 118, and cases cited in note 4; *Milton vs. Mosher*, 7 Met. 244; *Purviance vs. Sutherland*, 2 Ohio St. 478; *Sweetzer vs. Mead*, 5 Mich. 107."

In *Holt vs. Simmons*, 16 Mo. Ap. 97, a chattel mortgage was executed by one partner on the partnership assets without the knowledge or consent of his co-partner, and after dissolution, to secure a note of the firm executed by the partner who executed the mortgage. The court found that the party taking the note, did it without knowledge of the dissolution. It was held that the mortgage constituted a valid lien against the firm assets.

The court in deciding the case said:

"The well settled rule under this head is, that every partner in ordinary cases, and in the absence of fraud on the part of the purchaser, has a complete *jus disponendi* over all the partnership personalty. He possesses full power and authority to sell, pledge, and otherwise dispose of the entirety or any part of the goods, wares, merchandise, or other personal effects belonging to the firm, and

not merely his own share thereof, for purposes within the scope of the partnership. In respect of the shares of his co-partners, he is deemed to do such acts as their agent and as the accredited representative of the firm. Each partner is treated without any nicety of discrimination, and is deemed to possess a dominion over the entirety of the property, and therefore clothed with all the ordinary attributes of ownership. Story on Part. Sec. 95; *Keck vs. Fisher*, 58 Mo. 532; *Clark vs. Rivers*, 33 Mo. 579."

This decision was rendered in 1884, and is by SEYMOUR D. THOMPSON, held in high esteem by the legal profession.

In *Grazier vs. Stellwagen*, 25 N. Y. 315 and 317, Judge SELDON said:

"It having been settled in the case of *Mabbet vs. White*, 2 Kernan, 442, that a single partner has power in the absence of the other, notwithstanding the dissent of his co-partner, to transfer all the property of the co-partnership in payment of one or more debts of such co-partnership, I see no grounds upon which the defense in this case can be sustained."

In a recent case determined by the Supreme Court of Oregon, 16 Oregon, 153, 19 Pac. Rep. 73, the court used the following language:

"Having reached the conclusion that the instrument in question is a mortgage, and not an assignment, it remains to be considered whether one partner can, without the consent of the other, execute a chattel mortgage covering the entire partnership property to secure the payment of partnership debts. It must be conceded that each partner is

the general agent of the firm in the transaction of the business of the partnership. He may dispose of any or all of the property of the firm in the regular course of business, and apply the proceeds in the payment of the firm's debts, or he may deliver the property directly to the creditor in satisfaction of the firm's debts. Such being the power of a partner over the business of the firm, no reason is perceived why one member of the partnership may not pledge or mortgage the partnership property to secure the firm's debts. Cases will readily suggest themselves where it would be greatly to the interest of an embarrassed partnership to mortgage its property as security rather than be driven out of business by bankruptcy. And such seems to be the general current of authority. In *McClelland vs. Ramsen*, 36 Barb. 622, the principle is thus stated: 'But the authority of one co-partner to sell the co-partnership property to a particular creditor or creditors in payment of their debts has been judicially determined and is now the settled law. The power of a partner to dispose of the property of the firm extends to assignments of it as security for antecedent debts, as well as for debts to be thereafter contracted on account of the firm.' And this case was affirmed by the court of appeals, 3 Abb. Dec. 74. And *Mabbett vs. White*, 12 N. Y. 442, is to the same effect."

Numerous other authorities are cited by the court in support of its conclusion.

In *Nelson vs. Wheelock*, 46 Ill. 25, the action was one of replevin, growing out of a controversy in which the plaintiffs claimed a stock of goods under a chattel mortgage executed by one of the two partners, and the defendant claimed under a levy made by him as sheriff of Cook County, under a

writ of attachment sued out by H. B. Claflin & Co. against the firm. The opinion was written by Justice LAWRENCE, in which he states:

"It is objected that the mortgage was only executed by one member of the firm of Robison & Jaques. But one member of a mercantile firm has the right to execute a mortgage upon the goods of the firm, and deliver possession thereof to secure a firm creditor."

In *Whitten vs. Smith*, 1 Freeman's Chancery, pages 237 and 238, the chancellor determining that case says:

"One of the undisputed canons of the law of partnership is the right of each partner to sell the whole partnership property, if the sale be free from fraud on the part of the purchaser, and such a sale determinates the partnership relation."

In *Anderson vs. Tompkins*, 1 Brock. 459, Chief-Justice Marshall said:

"The convenience of trade requires that each acting partner should have the entire control and disposition of this subject. It would destroy co-partnerships entirely if the co-operation of all the partners were necessary to dispose of a yard of cloth. It is, therefore, laid down in all the books which treat on commercial transactions that with respect to all articles to be sold for the benefit of the concern, each partner, *though the others be within reach*, has, in the course of trade, an absolute right to dispose of the whole. 'Each,' says Watson, 'has a power to dispose of the whole of the partnership effects.' This is a general rule resulting from the nature of the estate, and from the objects for which

men associate in trade. They are joint tenants without the right of survivorship; they are seized *per mi et per tout*, and they associate together for objects which require that the whole powers of the partnership should reside in each partner who is present and acting. These general doctrines are universal and have not been controverted in this case; but it is contended that they do not authorize the deed made by Tompkins, because, 1st, This is not an act in the course of trade, but is a disposition of the whole subject and a dissolution of the partnership. 2nd, It is a preference to particular creditors, in making which Murray ought to have been consulted. 3rd, It is by deed. It will be readily conceded that a fraudulent sale, whether made by deed or otherwise, would pass nothing to a vendor concerned in the fraud. But with this exception I feel much difficulty in settling any other limits to the powers of a partner in disposing of the effects of the company purchased for sale. He may sell a yard, a piece, a bale, or any number of bales. He may sell the whole of any article, or any number of articles. This power would certainly not be exercised in the presence of a partner without consulting him, and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and, perhaps, to fix on it the imputation of fraud. In this respect, every case must depend on its own circumstances, but with respect to the power in a case perfectly fair, I can perceive no ground on which it is to be questioned.

"But this power, it is said, is limited to the course of trade. What is understood by the course of trade? Is it that which is actually done every day, or is it that which may be done whenever the occasion for doing it presents itself; there are small traders who scarcely ever, in practice, sell a piece of cloth uncut, or a cask of spirits. But may not a

partner in such a store sell a piece of cloth or a cask of spirits? His power extends to the sale of the articles, and the course of trade does not limit him as to quantity. So with respect to large concerns. By the course of trade is understood dealing in an article in which the company is accustomed to deal and dealing in that article for the company. Tompkims & Murray sold goods. A sale of goods was in the course of their trade and within the power of either partner. A fair sale, then, of all or a part of the goods, was within the power vested in a partner. This reasoning applies with increased force when we consider the relation of these partners." * * *

"Had this, then, been a sale for money or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason or in justice, between such a sale and the transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a small creditor, he may thus pay a large one. The *quantum* of goods sold cannot alter the right. Neither does it, as I conceive, affect the power, that those goods were conveyed to trustees to be sold by them. The mode of sale must, I think, depend on circumstances. Should goods be delivered to trustees for sale without necessity, the transaction would be examined with scrutinizing eyes, and might, under some circumstances, be impeached. But if the necessity be apparent, if the act is justified by its motives, if the mode of sale be such as the circumstances require, I cannot say that the partner has exceeded his power.

"This is denominated a destruction of the partnership subject and a dissolution of the partnership. But how is it a dissolution of the sub-

ject? Can this appellation be bestowed on the application of the joint property to the payment of the debts of the company? How is it a dissolution of the partnership? A partnership is an association to carry on business jointly. This association may be formed for the future before any goods are acquired. It may continue after the whole of a particular purchase has been sold. But either partner has a right to dissolve this partnership. The act, however, of applying the means of carrying on their business of the payment of their debts might suspend the operations of the company, but did not dissolve the contract under which their operations were to be concluded."

"The power of applying all the goods on hand for sale, to the payment of the partnership debts, is, I think, a power created by the partnership, and the exercise of it must be regulated by circumstances. In extraordinary cases, an extraordinary use of power must be made. What is called the course of trade, is not confined to the most usual way of doing business, in the usual state of things. In the absence of one of the partners, in a case of admitted and urgent necessity, the power to sell may be exercised by the partner, who is present, and who must act alone, in such manner as the case requires, provided it be exercised fairly. In this case the fairness of the transaction is not impeached, and, certainly upon its face, it is not impeachable."

"So far, then, as respects the partnership effects which were delivered, I have never, from the first opening of the case, entertained a moment's doubt."

It is true that in this case one of the co-partners was absent and could not be consulted. But it is also true, and the court evidently thought that as a matter of law, it was not necessary that he should be consulted, even if he were immediately

accessible. And this is the construction put upon this decision by the other courts of the country by whom it has been so largely cited.

See also:

Harrison vs. Sterry, 5 Cranch, 289.

The text writers on this subject have recognized the conclusiveness of the foregoing decisions.

In I Lindley on Partnership, edited by Ewell, (note to page 28) the editor says:

"One partner has authorty, without the consent or knowledge of his co-partner, to mortgage the whole stock in trade of the firm to secure a particular creditor of the firm."

One partner may execute a valid mortgage of property owned by the firm.

Herman on Chattel Mortgages, Sec. 118.

"The implied authority of a partner having power to borrow, to pledge the personal property of the firm for money borrowed, is beyond dispute."

Lindley on Partnership, Ewell's Ed. p. 285.

"The power of a partner to dispose of the property of the firm extends to assignments of it as a security for antecedent debts, as well as for debts to be thereafter to be contracted on account of the firm. Lord MANFIELD, in a cemebrated case, decided that after an act of bankruptcy committed by one partner, an assignment *bona fide* of partnership effects by the solvent partner to a creditor of firm, in payment of his debt, was binding on the firm. The assignment may be for the benefit of one creditor, or of several, or of all joint creditors, where all are admitted to equal participation."

Collyer on Partnership, Perkin's Ed. Sec. 395.

Upon the question of the right of a partner to make an assignment for the benefit of creditors, there is much conflict of authorities, as this author in the same section further shows. But as to the power of one partner to sell, mortgage or pledge the partnership property to pay or secure its bebts, there seems to be but little or no doubt.

"In virtue of this community of rights and interests in the partnership stock, funds and effects, each partner possesses full power and authority to sell, pledge or otherwise dispose of the entirety of any particular goods, wares, merchandise. or other personal effects belonging to the partnership, and not merely of his own share thereof, for the purposes within the scope of the partnership."

Story on Partnership, Sec. 94.

In determining the validity of this mortgage, the facts which surrounded its execution must needs be considered:

(*a*) It was executed by the two partners of the firm to whom the third committed the entire management of the firm's business. The debts secured had been created by them and upon their representations.

(*b*) At the time of its execution James B. Melone was absent in another part of the state, and was inaccessible for purposes of consultation.

(*c*) It was absolutely necessary that something should be done to protect the property from sacrifice by attachment. The Kansas City Savings Association, to whom they were indebted in the sum of $11,000, was threatening to attach if not secured;

and, if this had been done, it would have been followed, as a matter of course, by other attachments.

(*d*) As matters have turned out, these attachments would have been sustained, because the money borrowed was upon representations as to the condition of the firm which were fraudulent. But, whether fraudulent or not, the attachments would have been destructive to the property of the firm, which was claimed at the time to be solvent.

(*e*) The firm was dissoluble at will.

(*f*) Nor could James B. Melone claim that the execution of the mortgage would dissolve the partnership, because a dissolution was inevitable from the then existing condition of things. His individual creditors had a right to attach the entire firm property for his debts.

(*g*) If Benedict and R. A. Melone were honest in their representations and declarations that the firm was at the time solvent, and possessed assets more than sufficient to pay its debts, those assets then being subject to be seized by attachment at the instance of the individual creditors of James B. Melone, and thereby scattered and wasted, they had a right, and it was their duty in this view of the case, to take such steps as would, in their judgment, best protect the firm property from sacrifice by attachment, not only from the individual creditors of James B. Melone, but also from the firm creditors, who were threatening attachment at this very time, as we have already shown.

(*h*) They were not bound to make an assignment for the benefit of creditors, even if they had been directed to that end by a co-partner who had never had anything to do with the business of the firm, and who knew nothing of the dangers from the attachments which were threatened by the firm creditors at Kansas City; and he, it is fair to assume, knew nothing of the representations upon which some of these firm debts had been created. Moreover, it appears from the record that before they could have made their assignment their property would have been attached, and it was impossible for them to have accomplished this result had they undertaken to have done so. The Kansas City Savings Association appears to have learned of the three large failures at Macon as soon as the resident partners had.

(*i*) Even if James B. Melone had given a direction to make an assignment to his co-partners, it was coupled with the request that in the assignment the Macon Savings Bank be preferred, and this was unlawful. Nor could it have been complied with, because the amount of the debt due to that bank seems not to have been then understood. The indebtedness as shown by the books at Kansas City at that time amounted to $5,000; but as soon as a receiver was appointed, it was worked up, directly and indirectly to $50,000.

(*j*) It was not understood at the time by Benedict and R. A. Melone that James B. Melone had to the extent of his interest in the firm author-

ized an assignment. Such claim was not made at the time, and one of the reasons given why an assignment could not have been made was the necessity of obtaining James B. Melone's assent thereto.

(*k*) Not only was the mortgage executed by the two managing members of the firm, who did at the time what appeared to be for the best interests of the firm and necessary to save the firm property, but they contributed four-fifths of the firm capital, and ought in equity and right to be permitted to control the policy of the firm at a time when a crisis had arisen in its affairs which required them to act according to their own judgment and determine not only for themselves, but for their co-partner, as to what disposition should be made of the firm property in view of its large indebtedness.

1. The debts were just liabilities of the firm, and by all the authorities, even if an ordinary condition of things had existed, they had a right to turn over property sufficient to pay them, or to execute a mortgage on enough of the firm property to secure payment thereof. But instead thereof, they executed a mortgage on all the firm property, and designated a trustee therein who was an experienced man in the business in which they were engaged, and who they believed would handle the property of the firm to the best advantage of all concerned.

Can it be said that under the circumstances, and in view of the extraordinary condition of things which had arisen, that this was such a departure

from their duties that their acts must be condemned as wholly invalid?

Second. The chatlel mortgage should be held valid because James B. Melone, after knowledge of its execution received immediately thereafter, not only failed to repudiate it, but acquiesced in its execution and delivery for a period of twelae months and more.

It is certain that he knew of its execution. He says so himself. He says that his brother informed him that the banks had been preferred and that he thinks that he received this information five or six days after it had been done. His brother testifies that he thinks that he not only wrote to him that he had preferred the banks, but gave him the reasons for doing it. To this J. B. Melone says that he made no objections; that he never said "yea or nay." If his co-partners exceded their authority in dealing with third persons and he had knowledge of it, it was his legal duty to promptly repudiate the acts of his co-partners. "If a partner makes fraudulent use of the name or property of the firm, it should be clearly and immediately repudiated by his co-partners as soon as it comes to their knowledge. Any long delay may work ratification."

Parsons on Partnership (3 Ed.), page 124.

No objection was made to this mortgage. No. question was raised as to its legal effect until these proceedings were commenced, and this more than a year after its execution and delivery; and although the answer filed in this case, by James B. Melone,

some months thereafter contains a recital that he has never consented to or acquiesced in the mortgage, this is the first evidence of it, and when testimony is taken thereafter, he says, that he has never said, as to its execution and delivery, "yea or nay" and apparently repudiates the acts of his counsel in filing the answer that appears in this case. He permits the banks to be paid in full, which he aud his property were justly bound for and which onght to have been paid. It cannot be now said, after paying them, that he has any standing in equity to recall such payment. Will a a court of equity permit him to do it?

Even though the defendant banks have obtained a preference, there is nothing unlawful or repugnant to good morals in this. It has been recently decided by this court that if a partner dies his surviving partner, though himself insolvent, can make an assignment for the benefit of creditors and in such assignment give preferences.

Emerson vs. Senter, 118 U. S.. page 3.

See also *Williams vs. Whedon*, 109 N. Y. 333.

In this case it cannot be claimed and is not claimed that James B. Melone has been injured by the acts complained of, done by his co-partners. on the contrary, beyond any question, he has been benefitted by them. They have saved the firm property from being sacrificed at forced sale. But this is not all. It is alleged in the bill that the execution of the mortgage and the application for the appointment of a receiver to wind up the

affairs of the partnership, were parts of a single transaction, and that together they constitute an assignment for the benefit of creditors, and this is the basis of their claim for equitable relief. The evidence is that in the matter of the appointment of a receiver, Benedict was made complainant and the Melones defendants, and that H. H. Craig, the attorney for the firm, entered the appearance of J. B. Melone. To this part of the transaction he makes no objection. He does not attempt to repudiate it, but relies on it in his answer, in which, without conforming to any of the rules of equitable pleadings, he asks for the same relief as that prayed for in the complainant's bill.

It is extremely doubtful whether one partner can enter an appearance for another to a suit against the firm before dissolution, [*Hall vs. Lanning* 91 U. S., 160] and he certainly cannot do it after dissolution.

But this was not even a suit against the firm. It wss an action brought by one member of the firm against his co-partners, in which he prayed for a decree for dissolution and the appointment of a receiver to take charge of all his property. Can it for a moment be contended that one partner, whether he be plaintiff or defendant, can enter the appearance of his co-partner to such a proceeding? It therefore follows that James B. Melone cannot repudiate in part and affirm in part.

Third. If the acts of the two managing partners should be considered otherwise than valid, will not such mortgage, being for valid firm debts, be held to be good in equity to the extent of the shares or interests of the parties executing it, in the firm property?

It is generally conceded that one partner cannot make an assignment for the benefit of his creditors as against his co-partners, although upon this point the authorities are considerably divided.

In *Boker vs. Rurdekin*, 11 Meeson and Welsby, 127, it is held that "where a deed of assignment purporting to be made by all three partners of a firm, to convey all of ther personal property and effects whatsoever in trust for the benefit of creditors, was executed by one only, that it operated to convey the share of the one who so executed it."

It is conceded that one partner cannot confess judgment in favor of a creditor of a firm on a firm debt, so as to bind the firm; and yet, if he does, the interest of all the partners in the partnership property may be sold under an execution upon the judgment. Such act, although it does not bind personally the non-consenting partner, operates in law to transfer the property of the firm to the extent that it may be seized and sold for the payment of the firm debts under such judgment.

Ross vs. Howell, 84 Pa. State, 129.
Grier vs. Hood, 25 Pa. State, 25.

The same principle of law appears to be fully recognized in this court in *Wibusch vs. Farwell*, 1 Black 566–573; wherein it is said "although the other partners were not prosecuted to judgment because they were out of the jurisdiction of the court, still the judgment was rendered upon a partnership debt, to which it would be the duty of the marshal to apply partnership property in preference to the debts of the individual partners.

II.

Does a deed of trust, given merely as a security for debt, operate as an assignment for the benefit of creditors?

The statute on this subject is as follows:

"Every voluntary assignment of lands, tene-
"ments, goods, chattels, effects and credits, made by
"a debtor to any person in trust for his creditors,
"shall be for the benefit of all the creditors of the
"assignor in propertion to their respective claims,
"and every such assignment shall be approved or
"acknowledged and certified and recorded in the
"same manner as prescribed by law in cases where
"real estate is conveyed."

1st Rev. Stat. of Mo., page 54, Sec. 354.

This statute has been in force for many years, and never, at any time, directly or indirectly, have the state courts undertaken to attribute to it the meaning which has been placed upon it by some of the judges of our federal courts.

The statutes of Missouri permit a debtor to go into court and confess judgment in favor of one or

more of his creditors. His property is liable to be attached upon many grounds, and the attachment enures only to the benefit of the attaching creditor. If there are several attachments against his property, they are paid in the order in which the writs are levied. A creditor who first files a bill in equity to subject a debtor's property to the payment of his debt. obtains priority over other creditors who by like proceedings seek to accomplish the same end. In obtaining judgments and in the issue and levy of executions thereunder, it is always a race of diligence between creditors. If a debtor, instead of confessing judgments in favor of one or more of his creditors, or waiting until he is sued and preference is obtained by one or more of them in that way, chooses to prefer one or more creditors by a voluntary transfer or encumbrance of all or a part of his property, he is permitted to do so.

This has been the recognized law of this state at all times except during the period when the Federal bankrupt law was in force.

The statute quoted was enacted in 1864 and appears for the first time in the general statutes of this state in the revision of 1865. Since then the supreme court of Missouri has held, in Shelly vs. Booth, 73 Mo. 74, that "a debtor may give a prefer-"ence to a particular creditor or set of creditors by "a kirect payment or assignment, if he does so in "payment of his or their just demands and not as "a mere screen to secure the property to himself. "The pendency of another creditor's suit is imma-

"terial and the transaction is valid though done to "defeat that creditor's claims." *Kuykendall vs. McDonald* 15 Mo. 416." *Murry vs. Cason*, 15 Mo. 415." *Steel vs. Benoist*, 36 Mo. 500." Bump on Fraudulent Conveyances, 350–351. *Potter vs. McDonald*, 31 Mo. 74.

"The right of a debtor to prefer one creditor "over another necessarily implies the right of such "creditor to accept such preference, while the effect "of such preference must, to the extent that it is "made, necessarily be to defer or hinder or delay "other creditors. The mere knowledge of the pre- "ferred creditor that such will be its effect and that "the debtor intended that it should have that effect, "will not be sufficient to avoid the transaction as to "a creditor not preferred."

The foregoing decision was rendered in 1880.

In *Cason vs. Murray*, 15 Mo. 378, the court used this language:

"It is not necessary to quote books for the pur- "pose of showing that a debtor in failing circum- "stances may give a preference to one or more of "his creditors to the exclusion of others and that "such disposition of his effects is not impeachable "on the ground of fraud because it embraces all his "property. It may be assumed that this principle "is so universally known as to render reference to "books unnecessary."

The federal courts have reached the same conclusion. In *Tompkins vs. Wheeler*, 16 Peters, 118, it is held:

"That a debtor has a legal right to prefer one "or more of his creditors over others, when the "transaction is *bona fide*, is not an open question in "this court."

In *Clark vs. White*, 12 Peters at page 200, in discussing a preference obtained by one creditor over others, the court says:

"The rule cutting off underhand agreements "in cases of joint and general compositions as a "fraud upon the other compounding creditors, and "because such agreements are subversive of sound "morals and public policy, has no application to a "case like the present, where each creditor acts "only for himself, but in opposition to every other "creditor, all equally relying upon their vigilance "to gain a priority, which, if obtained, each being "entitled to have satisfaction, the payment cannot "be questioned. The debtor may prefer one credi- "tor, pay him fully and exhaust his whole property, "leaving nothing to others equally meritorious. "Yet their case is not remediable; and why may "not debts be partially paid in uneqal amounts? "If those who receive partial payments are willing "to give releases, it is their own matter; and should "a third person interfere, debtor and creditor could "well say to him, you are a stranger and must stand "aside. The case of the appellee presented a fair "instance of the propriety of paying some of his "debts fully ann other partially. He owed bank "debts secured by the endorsements of friends, "whose kindness was the only motive to incur the

"liability, to relieve whom he did pay and ought "to have paid large sums during October and No- "vember, 1883."

In *Marbury vs. Brooks*, 7 Wheaton, at page 577, Chief Justice MARSHALL says:

"That a debtor has a right to prefer one cred- "itor to another cannot be denied, and that his pri- "vate motives for giving this preference, provided "the preferred creditor has done nothing improper, "cannot annul this right is equally certain."

And in *Brooks vs. Maybury*, 11 Wheaton, page 99, in discussing a preference made in that case, through a trustee, of whom it was alleged that he had knowledge of improper motives of the debtor, the court, speaking through Chief Justice MARSHALL, again said:

"The preference of creditors of a particular "description over others being one which a debtor "has a right to make, the sale of his property and "the payment of the proceeds to such favored cred- "itors being an act which the debtor may perform "by himself or his agent, we cannot conceive that "the motives which may have induced the prefer- "ence, although communicated to the agent, in rea- "son affect the transaction, provided nothing has "occurred on the part of the creditors, which is in "any degree exceptionable, either in law or jus- "tice."

It follows from the foregoing that no rule of law, federal or state, is violated when a Missouri

debtor in failing circumstances undertakes to prefer one creditor at the expense of others.

What meaning, then, is to be given to Section 354, relating to the voluntary assignment of property by a debtor to a person in trust for his creditors? This section has been construed in *Crow vs. Beardsley*, 68 Mo. 438, and in that decision the distinction is made between a deed of trust to secure a debt and a voluntary assignment of property by a debtor in trust for his creditors. In that case a deed of trust was executed by Beardsley and wife, in which he conveyed a stock of merchandise, real estate, book accounts, cattle, horses, wagons and agricultural implements to one Kennon, in trust to secure the payment of a large number of creditors therein named, and the court held that this did not constitute an assignment within the meaning of the assignment law of Missouri, and in determining the question, said:

"But is the deed an assignment? 'An assign-"ment is more than a security for the payment of "debts; it is an absolute appropriation of property "to their payment.' Burrill on Assignments, vol. "1, p. 12. The same author distinguishes between "assignments and deeds of trust in the nature of "mortgages. He says, page 15: 'In most of the "states assignments in trust are frequently employed "for a double purpose—ultimately as modes of pro-"visions for the payment of debts, but intermedi-"ately as instruments of security against default of

"payment by the debtor. Hence they are in many "cases drawn with a condition that if the grantor "pay the debt provided for within a specified time, "the trustee shall reconvey to him the property, or "that the deed shall thereupon be void, or, *e con-* "*verso*, that if the debtor do not pay the debt by a "day named, the trustee shall sell the property and "apply the proceeds in payment.' The distinction "is, that an assignment 'is a conveyance to a trustee "for the purpose of raising funds to pay a debt, "while a deed of trust in the nature of a mortgage, "is a conveyance in trust for the purpose of securing "a debt subject to a condition of defeasance.' 19 "Ohio 216; *State to use vs. Benoist*, 37 Mo. 500. "The deed in question here is, therefore, a deed of "trust in the nature of a mortgage. That the word "'assignment' in section one of the act relating to "assignments does not comprehend deeds of trust, as "they are familiarly known, is more apparent if we "consider in this connection the act in relation to "trusts and trustees. Wag. Stat. 1347. It is a clear "recognition of a distinction betwixt assignments "and deeds of trust."

The deed of trust referred to in this case is not set out in full in the report, but a certified copy of it appears in the brief of our associate counsel on page 52.

The statutes of Missouri, as well as its decisions, have always, since the enactment of section 354, relating to voluntary assignments, made a clear distinction between deeds of trust conveying

property, real or personal, to secure debts, and voluntary assignments of property by a debtor in trust for his creditors under said section. To illustrate: Provision is made for the foreclosure of deeds of trust in the nature of mortgages in the same manner in all respects as in the case of mortgages.

1 Rev. Stat. 1789, Sec. 3298.

The trustee may advertise and sell the property at public vendue, but before making such sale must give notice for twenty days by publication in some paper published in the county in which the real estate is situated.

Session Acts, 1885, page 209.

This method of foreclosure has been recognized for years by the practice and decisions of Missouri.

Corson vs. Blakely, 6 Mo. 273.
11 Mo. 484.
29 Mo. 13.

If the trustee in a deed of trust to secure the payment of a debt or other liability dies, the beneficiary in the deed of trust can apply to the circuit court of the county in which the property is situated, and the court will appoint the sheriff or some other suitable person to execute the trust.

Rev. Stat. Secs. 3929, 3930.

The statutes fix, also, the compensation which the trustee shall receive for selling property under a deed of trust in the nature of a mortgage.

The statutes further provide that a deed of trust of personal property shall not be valid against any person other than the parties thereto unless the

possession of the mortgaged or trust property be delivered to the trustee or beneficiary, or unless the execution of the deed of trust be acknowledged and recorded in the county in which the mortgagor resides.

Rev. Stat. 1879, Sec. 2503.

Every one of these provisions is inconsistent with the assignment law and the duties of an assignee appearing in chapter 5 of assignments for the benefit of creditorf.

Notwithstanding these decisions of the Missouri courts and its statutes, the district judge for the Western District of Missouri, then sitting as a circuit judge, held in *Martin vs. Houseman*, 14 Fed. Rep. 160, that a deed of trust executed to secure a debt and not intended to be a voluntary assignment for the benefit of creditors, in which the grantor therein undertook to dispose of all his business and property, thereby declaring insolvency, had in legal effect, made a voluntary assignment for the benefit of all his creditors named and unnamed in the deed.

This case announced a ruling wholly at variance with what had been considered to be the law by the profession in the state. This method of preferring creditors by debtors in failing circumstances has been practiced for years throughout the state.

But the decision of *Martin vs. Houseman* has since been followed in some other decisions.

The present circuit judge, Brewer, has protested against its correctness, but has nevertheless felt himself bound by it because of the previous rulings made by district judges for Missouri sitting as circuit judges and the concurrence therein of his predecessor, Judge McCrary. Both of the present district judges, Thayer and Phillips, are on record against the ruling announced in *Martin vs. Houseman*.

In *Perry vs. Cosby*, 21 Fed. Rep. (1884), Judge BREWER said that if the question was an original one with him, his conclusions would be different and in conformity with the decisions in *National Bank vs. Sprague*, 20 N. J. Equity 28; *Farwell vs. Harvard*, 26 Iowa 321; *Doremus vs. O'Hara*, 1st Ohio 45; *Atkinson vs. Tomlinson*, Id. 241; but as there had been such a course of decisions in his circuit for Missouri as to establish the rule in the United States courts in accordance with the opinion in *Martin vs. Houseman*, that until there should be some authoritative construction of the statute by the Supreme Court of the United States or of the state, he would follow the rule laid down in the last mentioned case.

In *Clapp vs. Nordman*, 27 Fed. Rep. 71 (1885), the same judge said, referring to some previous decisions in which the principle in *Martin vs. Houseman* was recognized: "In those cases I felt con-"strained to follow the ruling laid down by my "predecessor," at the same time saying that he did not believe that the ruling was right.

Again, in *Elgin National Watch Company vs. Meyer*, in 30 Fed. Rep., page 659, Judge BREWER speaks of this subject.

"That line of decisions has been followed since "I have been on the bench by myself under protest, "not believing it to be a true construction of the "Missouri statutes, but I have hitherto been alone "in that visw, so far as the federal judges in this "state (Missouri) are concerned. I am glad to say, "however, that I have one with me now who thinks "as I do as to the proper construction of the "statute."

In this opinion he referred to Judge Thayer, of the Eastern District of Missouri, who evidently concurs with him that *Martin vs. Houseman* does not state the law correctly.

In the mean time this same question came before the Court of Appeals of Missouri, and that court refused to follow *Martin vs. Houseman.* In that case a deed of trust was executed conveying chattels and real estate to a trustee therein named to secure a large number of creditors named in the deed. It is not recited that it includes all the property of the grantor, but it does convey a stock of dry goods, furniture, etc., in a certain store-house, and lands and other property. It was contended that this deed operated as a voluntary assignment but the Court refused to give it that effect.

Smith & Keating Implement Company vs. Thurman, 29 Mo. Appeals 186 (1888).

We should add that the opinion in the case

last cited was written by Phillips then the Presiding Judge of that Court and now the District Judge for the Western District of Missouri.

It can now be safely asserted that the Circuit Judge and both of the District Judges are against the ruling made in Martin V. Houseman.

At the October term of the Supreme Court of Missouri this precise question came before it and the ruling of the Court was as follows:

"The assignment law of Missouai is not, in let-
"ter or spirit, a bankrupt or insolvent debtors act.
"A debtor, whether solvent or insolvent, may in
"good faith sell, deliver in payment, mortgage or
"pledge the whole or any part of his property for
"the benefit of one or more of his creditors to the
"exclusion of others, even though such transfer may
"have the effect of delaying them in the collection
"of their debts."

Hargadine V. Henderson, 97 Mo. 375-386.

In this case a deed of trust was executed by an insolvent debtor, conveying all his property to a trustee to secure certain creditors therein named.

III.

Do the making of the deed of trust and the proceedings to wind up the partnership, and the appointment of a receiver under such proceedings, constitute a general assignment for the benefit of the creditors?

This question can be readily answered in view of the decisions already made. In *Sampson vs. Shaw*, 19 Mo. Ap. 274, it is held:

First. Where two instruments are executed at the same time between the same parties, relative to the same subject matter, and to effectuate one object, they are to be taken together. But where two deeds are given to different persons for different considerations, not executed at the same time, nor relative to the same subject matter, nor to effectuate the same object, they will be considered and take effect as separate instruments.

Second. The statute of Missouri is wholly dissimilar to a bankrupt law, and extends only to forbidding preferences in and by the deed of voluntary assignment for the benefit of creditors intended as such, and by which the debtor surrenders to his creditors all dominion over his property, and a distinct and special transfer by a debtor before he has surrendered such dominion, even if in contemplation of a general assignment, is valid and not within the statute.

The court, in reaching this conclusion, says:

"We think that our statute is founded upon an entirely different basis from a bankrupt law, and that it goes no further than to forbid preferences in and by the instrument by which the debtor surrenders to his creditors all dominion over his property; and that a distinct and special transfer by a debtor before he has surrendered such dominion, even though in contemplation of a general assignment,

is valid and not within the statute. *Meredith Manufacturing Co. vs. Smith*, 8 N. H. 348; *Low vs. Wyman*, 8 N. H. 536; *Barker vs. Hall*, 13 N. H. 298; *Brown vs. Foster*, 2 Metc. 152; *Henshaw vs. Sumner*, 23 Pick. 446; *Fairbanks vs. Haynes*, 23 Pick. 323; *Bates vs. Coe*, 10 Conn. 280; *Wounan vs. Wolfersberger's Executors*, 19 Pa. St. 59; *Lampson & Powers vs. Arnold*, 19 Iowa, 481.

"As said in *Shapleigh vs. Baird* (26 Mo. 326): 'Indeed, if the legislature wish to strike at the root of the evil, they must go back to an old principle of the common law which permits a debtor to prefer one creditor to another, and which privilege can be effected in a variety of modes other than referred to in our statutes concerning assignments.'

"This our legislature have not done, in our opinion.

"The first and leading case, upon which most if not all of the cases sustaining respondent's position depend, is the case of *Perry vs. Holden* (22 Pick. 275). That case, however, was an exceptional case, and as afterwards explained by Shaw, C. J., who wrote the opinion on it in *Fairbanks vs. Haynes* (23 Pick. 323), and *Brown vs. Foster* (2 Metc. 152), it is not an authority in favor of the view expressed in those subsequent cases; but upon the whole it is an authority for the views herein expressed, considering the differences between the Massachusetts statutes and our statutes. Our statute does not prevent a creditor from obtaining a preference by attachment or other legal process; and it is impossible for us to see any reason in holding that it prevents the debtor from voluntarily giving such a preference. In the one case the fact that the debtor was about to make an assignment would not prevent the creditor from securing a preference; in the other case such fact would not

deprive the debtor of the privilege of giving such a preference."

The Voluntary Assignment Act of Kansas contains precisely the same provision as the one under consideration in Missouri.

Complied Laws of Kansas, 1885, page 96, Sec. 384.

In *Bailey vs. The Kansas Mfg. Co.*, 32 Kansas, 79, it is said in construing this statute:

"It is well settled that an insolvent, as long as he retains a *jus dispoendi* of his property, may appropiate it to the payment of his debt, and may prefer creditors. He may use all his property this way, or he may so use a part, and make a general assignment of the remainder. *Lampson vs. Arnold*, 19 Iowa, 479; *Dodd vs. Hills*, 21 Kansas, 707; *Randall vs. Shaw*, 28 *id.* 419."

It was held in *Dodd vs. Hills*, *supra:*

"The fact that, pending a contemplated assignment for the benefit of creditors, a mortgage was executed in good faith by the debtor to one of his creditors to secure a pre-existing debt, which mortgage had long previously been promised by the debtor to such creditor, does not show that the deed of assignment, subsequently executed, was executed with the intention of hindering, delaging and defrauding creditors; nor does it render such deed of assignment void."

On page 80, the court further says:

"There is nothing in the assignment act that prohibits the execution of chattel mortgages, or that prohibits the transfer by pledge or otherwise of any kind of property to a creditor to secure the payment of a debt due to such creditors; nor is the execution of chattel mortgages, or the transfer

of property to secure a creditor, against the spirit or intention of the statute regulating voluntary assignments."

Again, on page 31:

"It is difficult to say upon what principle or for what reason a chattel mortgage, executed in good faith for the benefit of certain creditors upon the same day that the deed of general assignment is executed, must be considered a 'single transaction.'"

We conclude, without citing other authorities to the same point, that the decisions of the courts of Missouri and Kansas on this particular statute are sufficient to establish that the giving of the mortgage and the proceedings to wind up the partnership do not constitute a general assignment for the benefit of creditors. We have also shown in our statement that the parties did not intend that it should have this effect, but, on the contrary, they distinctly understood that they were preferring the banks, and it was their purpose to do so.

Moreover, it appears from the evidence that the execution of the mortgage and the proceedings to wind up the partnership were not simultaneous acts, nor were they both in contemplation when the mortgage was first executed and delivered. The testimony of the legal counsel who prepared the mortgage, and the trustee, Stewart, are both positively to the effect that the proceedings to wind up the partnership had not been determined upon until after the execution and delivery of the mortgage. The testimony of complainants' two witnesses can

be read in support of or against the testimony of the defendants; they talk differently at different times, and very little, if any, weight can be attached to anything they say on this point. But in the main they support the defendants.

Second. If the deed of trust is invalid because its execution was not authorized by James B. Melone, as complainant's counsel so urgently contended, how, then, can such an invalid instrument be coupled with the proceedings to wind up the partnership, and the two be adjudged an assignment for the benefit of creditors.

If the mortgage is wholly invalid as a firm transaction, then it can have no effect whatever, and it cannot be united to the other proceedings and be given force.

The complainant's bill demands equitable relief upon one ground only, and that is, that the deed of trust and the proceedings to wind up the partnership were but single transactions and, in law, constitute a voluntary assignment, and the equitable powers of the court are sought to be invoked to have those two matters declared to have this legal effect. If the mortgage drops out as a legal nullity, then there is nothing left upon which to base the relief prayed for.

IV.

COMPLAINANTS NOT ENTITLED TO EQUITABLE RELIEF.

The complainants are not in a position to commend themselves to the favorable consideration of a court of equity. They are now denouncing most lustily the right of preference in general, and the preference given to the defendant banks in particular. They are now in love with that legal maxim that "Equality is equity;" they applaud it to the skies, and they would give it controlling force in all the affairs of mankind. And yet, the first steps taken by the complainant bank, which is the holder of some of the accommodation paper given by the firm for the benefit of the Macon banks, and its associates, were to commence suits against Benedict, Melone & Co., and garnishment proceedings against Stewart, and thereby have sought to obtain for themselves those preference which, now since their conscience has been quickened by defeat, appears so unfair, unjust and inequitable.

The complainants by those proceedings attacked those acts of Benedict, Melone & Co. which they say now constitute a voluntary assignment. If they amount to a voluntary assignment now, they surely did when their attachment suits were commenced. They cannot claim against and under an assignment. They elected to claim against it, and discovering that by this election they could not succeed,

they dismissed their attachment proceedings and came in before the receiver and had their claims allowed.

In *Valentine vs. Decker*, 43 Mo. 583, it is held that a creditor cannot attach property in the hands of an assignee and afterwards claim a distributive share under the assignment.

An election of remedies is binding on the one making it, and he cannot afterwards pursue an inconsistent remedy.

Buckley vs. Morgan, 46 Conn. 394;
Brimley vs. Tibbetts, 7 Greend (Me.) 70;
Bailey vs. Harvey, 135 Mass. 172;
Moller vs. Tuska, 87 N. Y. 166.
Rodermund vs. Clark, 46 N. Y. 354.

An election is binding though the court had not jurisdiction of the cause of action.

Nield vs. Burton, 49 Mich. 53.

V.

JURISDICTION.

We assume, that notwithstanding the fact that this cause is presented to this court upon a certificate of division of opinion, that we can raise the question or jurisdiction.

The pleadings and evidence show that Stewart was appointed receiver of Benedict, Melone & Co. by the Circuit Court of Jackson County, at Kansas City, Missouri, and that as such receiver he duly qualified and took all the property and became responsible to the creditors of that firm. The

property then went into the custody of the court. If he, without the orders of that court, has unlawfully applied the funds which came into his hands as such receiver to the payment of defendant banks in contemplation of law, he still holds that money, and as an officer of the court in which he was appointed, he must respond to the lawful claims of the creditors of such firm. He is merely withholding it from them.

Now, will this court review the official acts of an officer of a state court? Upon this point we respectfully submit the following authorities:

Taylor vs. Carroll, 20 Howard, 583.
Freeman vs Howe, 24 Howard, 450.
Buck vs. Colbaith, 3 Wallace, 134.
Evelyn vs. Lewis, 3 Hare, 472.
14 Howard, 52.
10 Johnson, 521.

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